United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR THE DISTRICT OF COLUMBIA AND APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

364

No. 23,997

DISTRICT OF COLUMBIA,
Petitioner
~~Appellant,~~

v.

ALLEN BERENTER, ET AL.,
Respondent
~~Appellees.~~

No. 24,003

ALLEN BERENTER, ET AL.,
Respondent
Cross ~~Appellants,~~

v.

DISTRICT OF COLUMBIA,
Petitioner
Cross ~~Appellee.~~

On Petition For Review Of A Decision
Of The District Of Columbia Tax Court

HUBERT B. PAIR
Acting Corporation Counsel, D.C.
HENRY E. WIXON
Assistant Corporation Counsel, D.C.
ROBERT E. MC CALLY
Assistant Corporation Counsel, D.C.
Attorneys for the District of Columbia
District Building
Washington, D.C. 20004

TABLE OF CONTENTS

TABLE OF CASES

* Cases chiefly relied upon are marked by an asterisk.

STATUTES CITED

OTHER AUTHORITIES CITED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,997

DISTRICT OF COLUMBIA,

Appellant,

v.

ALLEN BERENTER, ET AL.,

Appellees.

No. 24,003

ALLEN BERENTER, ET AL.,

Cross Appellants,

v.

DISTRICT OF COLUMBIA,

Cross Appellee.

On Petition For Review Of A Decision
Of The District Of Columbia Tax Court

BRIEF FOR THE DISTRICT OF COLUMBIA

This case has previously been before this Court on cross motions for summary reversal and summary affirmance, which motions were denied on July 31, 1970.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

In the opinion of counsel for the District of Columbia, the issues presented herein are:

1. Was not the Tax Court's decision in favor of the taxpayers in Appeal Docket No. 23,997 incorrect because, as stated in the District's motion to dismiss the taxpayers' petition, the Tax Court lacked jurisdiction over the appeal since the taxes complained of had not been paid in full prior to the filing of the petition in the Tax Court?

2. Was not the Tax Court's decision in Appeal Docket No. 24,003 correct in denying the taxpayers' motion to amend the petition so that the decision in that case would govern the taxable year 1970 and all subsequent years even though the taxpayers had not met the procedural review requirements of the applicable taxing statute?

REFERENCES TO RULINGS

1. "Ruling and Order on Motion to Dismiss Petition", D.C. Tax Court Docket No. 2072, June 19, 1969, App. 36-61.

2. "Decision", D.C. Tax Court Docket No. 2072, January 13, 1970, App. 110-115.

STATEMENT OF THE CASE

On December 30, 1968, Allen Berenter, Allen Morris, Max Leder, David Hornstein, the General Partners of Towne Towers Associates, a limited partnership, hereinafter referred to as "taxpayers", filed a petition in the District of Columbia Tax Court to " * * * protest a Real Estate Tax Assessment for the fiscal year 1969 made pursuant to Section 47-708, District of Columbia Code. * * * " The petition

identifies the properties as lots 29 and 934 in square 212. The taxes in controversy are real property taxes on the described lots for the fiscal year 1969. The petition stated in essence that the valuations of the properties were excessive, although no particular valuation was placed on the properties here involved, nor did the petition state the amount of taxes that had been paid prior to filing the petition. (App. 3-8.)

The District thereafter filed in the Tax Court a motion to dismiss the petition on the ground that the Tax Court lacked jurisdiction for the reason that the taxpayers had failed to pay all the real property taxes complained of prior to the filing by them on December 30, 1968, of their petition. (App. 32.) The record in this case indicates that the taxpayers paid the first half of the real property taxes on September 30, 1968, and the second half of the real property taxes on March 26, 1969. (App. 62-68.)

On June 19, 1969, the Tax Court denied the District's motion to dismiss although counsel for the District had cited Greenstein v. District of Columbia, D.C.T.C. Order dated May 10, 1962 (affirmed without opinion by the United States Court of Appeals for the District of Columbia Circuit on

February 13, 1963). (App. 48,61.) The District then filed its answer to the petition and the taxpayers, on October 10, 1962, filed a "Motion For Leave To Amend Petition." The Tax Court deferred its ruling on the motion and the case was heard on the merits on October 20, 1969. (App. 74, 69.)

As the Tax Court in its decision stated, counsel for the taxpayers and counsel for the District stipulated that

> " * * * Mr. F.E. Diamond, a qualified fee appraiser in the District of Columbia, personally present at the hearing, would testify that in his expert opinion the appraised value of the Towne Towers Apartments for purposes of D. C. real estate tax for fiscal year 1969 is $1,173,250 and of the Aristocrat Apartments is $884,000, rather than, respectively, $1,280,581 and $1,029,944 at which figure said properties were assessed. * * * " (App. 62.)

The District presented no evidence and elected to stand on its "Motion To Dismiss" which was grounded on the lack of jurisdiction of the District of Columbia Tax Court to hear the proceeding on the merits.

On January 13, 1970, the Tax Court handed down its decision in which it said:

> "1. Petitioners' motion for leave to amend be, and hereby is, denied.
>
> "2. Respondent's motion to dismiss, re-presented at the hearing herein, be and hereby is denied. The Ruling and Order on Motion to Dismiss issued June 19, 1969 is hereby incorporated herein by reference.

> "3. Petitioners shall have and recover from the District of Columbia the sum of $7,598.25 plus statutory interest, on account of excess taxes paid on the properties more fully described in the petition herein, for the fiscal year 1969." (App. 115.)

The District and the taxpayers then filed Cross-Petitions For Review Of A Decision Of The District Of Columbia Tax Court. (App. 115-117.)

On March 26, 1970 this Court granted the motion of the taxpayers to consolidate the cross appeal and appeal, each of which had been filed on March 11, 1970.

On March 30, 1970 the District and the taxpayers filed a joint motion to extend the time within which to file the brief and joint appendix and requested the Court to grant additional time for both parties to file their petitions for summary relief. This motion was granted on April 27, 1970.

Thereafter the District filed on April 24, 1970 a combined motion for summary reversal in docket number 23,997 and for summary affirmance in docket number 24,003. The taxpayers thereafter, on May 4, 1970, filed their combined motion for summary affirmance in docket number 23,997 and for summary reversal in docket number 24,003. On July 31, 1970 this Court denied all motions.

ARGUMENT

I

The Tax Court lacked jurisdiction over the taxpayers' appeal because the taxes complained of had not been paid by them in full prior to the filing of a petition in the Tax Court

The language of the statute authorizing an appeal in real property tax matters appears in Section 47-709, D.C. Code, 1967, and is as follows:

> " * * * Any person aggrieved by any assessment, equalization, or valuation made may within ninety days after October 1 of the year in which such assessment, equalization, or valuation is made, appeal from such assessment, equalization, or valuation in the same manner and to the same extent as provided in sections 47-2403 and 47-2404: Provided, however, That such person shall have first made his complaint to the Board of Equalization and Review respecting such assessment as herein provided, except that, in case of increase of valuation of real property over that for the immediately preceding year, where no notice in writing of such increase of valuation is given the taxpayer prior to March 1 of the particular year, no such complaint shall be required for appeal."

Section 47-2403, D.C. Code, 1967, which provides the basis for appeals to the Tax Court, reads:

> "Any person aggrieved by any assessment by the District against him of any personal-property, inheritance, estate, business-privilege, gross-receipts, gross-earnings, insurance-premiums, or motor-vehicle-fuel tax

> or taxes, or penalties thereon, may, within ninety days after notice of such assessment, appeal from such assessment to the board, provided such person shall first pay such tax, together with penalties and interest due thereon, to the collector of taxes of the District of Columbia. The mailing to the taxpayer of a statement of taxes due shall be considered notice of assessment with respect of such taxes. The board shall hear and determine all questions arising on said appeal and shall make separate findings of fact and conclusions of law, and shall render its decision thereon in writing. The board may affirm, cancel, reduce, or increase such assessment." (Underscoring supplied.)

With the exception of the requirement that a person complaining of a real property tax assessment must first seek review before the Board of Equalization and Review, the procedure for an appeal to the Tax Court in real property tax cases is identical with the procedure prescribed for appeals in other District tax matters. In all such cases, Section 47-2403 of the Code requires that the person aggrieved

> " * * * shall first pay such tax, together with penalties and interest due thereon, to the collector of taxes of the District of Columbia. *** "

The authority of the Tax Court is to " *** affirm, cancel, reduce, or increase such assessment." and, according to Section 47-2407 of the Code,

> "Any sum finally determined by the [Tax Court] to have been erroneously paid by or collected from the taxpayer shall be refunded by the District to the taxpayer from its annual appropriation for refunding erroneously paid taxes in said District." (Underscoring supplied.)

If the Tax Court can assume jurisdiction in a case where only a portion of the tax assessment has been paid by the taxpayer, it would be difficult, if not impossible, for the Court to make a final determination of the matter in issue. Only in the event that the Tax Court concluded that no tax was due from the taxpayer, or that the partial payment was at least equal to or exceeded the taxpayer's total liability for taxes, would it be possible for the Tax Court to enter a final decision, other than by a type of declaratory judgment which is not authorized by statute. Thus, only in an extreme case where the Tax Court concludes either that no tax whatsoever is due from the taxpayer or that the partial payment exceeds the taxpayer's total liability for tax, would it be possible to apply the refund requirement of Section 47-2407 of the Code.

Real estate taxes and personal property taxes may be paid semi-annually in equal installments in the months of September and March (Section 47-1209, D.C. Code, 1967). If

they are not so paid, the statute provides for the addition of a penalty to continue during the period of the delinquency.

Although certain District taxes, including real property taxes, are payable on the installment plan, if the taxpayer so elects, no such election is permitted where the taxpayer contests the assessment by a proceeding in the Tax Court. In all such cases the total tax assessed must be paid before the proceeding is instituted. There is but one exception to this requirement, and that exception appears in connection with the payment of taxes on real property claimed to be exempt. In Section 47-801e of the Code it is stated:

> "Any institution, organization, corporation, or association aggrieved by any assessment of real property deemed to be exempt from taxation under the provisions of sections 47-801a, 47-801b and 47-801c to 47-801f may appeal therefrom to the Board of Tax Appeals for the District of Columbia in the same manner and to the same extent as provided in sections 47-2403 and 47-2404: Provided, however, That payment of the tax shall not be prerequisite to any such appeal." (Underscoring supplied.)

The foregoing provisions of the statute relating to District tax appeals make it clear that it is the entire tax, and not a portion of it, which must be paid as a prerequisite to an appeal to the Tax Court, a fact which has been the subject of consideration in prior cases before

this Court. In 1951 in Industrial Bank of Washington v. District of Columbia, 88 U.S. App. D.C. 233, 188 F.2d 46, the Court noted that the requirement of payment of a disputed tax is clearly jurisdictional and in its opinion referred to District of Columbia v. McFall, 88 U.S. App. D.C. 217, 188 F.2d 991, where a similar statement had been made.

The Committee Reports on H.R. 10066, 75th Congress, 3rd Session, which became the Act of May 16, 1938, and added Title IX to the District of Columbia Revenue Act of 1937 establishing the then Board of Tax Appeals, contained no reference to the tax prepayment provision in connection with tax appeals. The only reference to the payment of taxes is found in the following paragraph contained in Senate Report No. 1612 accompanying H.R. 10066, 75th Congress, 3rd Session, dated April 18, 1938, and in House Report No. 2105, 75th Congress, 3rd Session, accompanying H.R. 10066 dated April 7, 1938, reading as follows:

> "Any person aggrieved at an assessment shall within the time prescribed in the title [Title IX] appeal to the Board, and from the Board direct to the United States Court of Appeals for the District of Columbia. If the Board is established, a great deal of time will be saved in the disposition of tax appeals, a certain and practical method of appeal is afforded taxpayers, and the payment of taxes will be substantially increased."

It is probable that no reference was made in the Committee Reports to the requirement of full payment of a disputed tax as a prerequisite to an appeal because the statutory language was not thought to be susceptible of any question. Had Congress intended to permit partial payments in connection with District Tax Court appeals, it could easily have done so. It chose, however, to employ the existing language which states that after notice of an assessment of taxes, a taxpayer may appeal within ninety days therefrom to the Tax Court " * * * provided such person shall first pay such tax, together with penalties and interest due thereon ***."

The requirement of the District's statute on appeals to the Tax Court that the person appealing " * * * shall first pay such tax, together with penalties and interest due thereon, * * *.", is, if anything, much more definite and mandatory than a counterpart provision of the statute conferring jurisdiction in federal tax matters upon United States District Courts which was considered in Flora v. United States, 357 U.S. 63, 2 L.Ed.2d 1165, 78 S.Ct. 1079, affirmed on rehearing, 362 U.S. 145, 4 L.Ed.2d 623, 80 S.Ct. 630.

The statutory language under review in Flora was 28 U.S.C. § 1346 (a) (1), which reads as follows:

> " '(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> " '(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws; * * *.' (Emphasis supplied.)"

The question in Flora was whether a taxpayer could maintain a suit in a District Court in a case where a deficiency assessment in taxes had been levied against him for $28,908.60, including interest, and where petitioner made two payments on the assessment totaling $5,058.54, submitted a claim for refund of the amounts he had paid which was disallowed, and then filed suit for a recovery of those amounts. The Supreme Court in both its first and second decisions held that payment of the assessment in full was required before any recovery of any amount of the assessment could be had so that the taxpayer's failure to pay the entire tax assessed against him resulted in a failure of the District Court to acquire jurisdiction.

Since 1951 when this Court, in Industrial Bank of Washington v. District of Columbia, supra, commented upon the

requirement of payment of a disputed tax as being jurisdictional, until December 28, 1961 when such a case (Greenstein, D.C.T.C. Docket No. 1785) was presented, no case, other than real property tax exemption cases, have, so far as counsel for respondent are aware, ever been presented to this Court on appeal except where the entire tax assessed and complained of has been paid prior to the filing of an appeal in the District of Columbia Tax Court. In Greenstein, supra, a petition was filed seeking a review of real estate tax assessments for the fiscal year 1962. The first half of those real estate taxes was paid on September 26, 1961 and the last half was paid on March 19, 1962. The case was heard and then decided on May 10, 1962, at the conclusion of the petitioner's opening statement. The Tax Court stated:

> "It appearing to the Court that the petitioners failed to pay the entire taxes here involved prior to the filing of the petition herein on December 28, 1961, it is by this Court this 10th day of May, 1962,
>
> ORDERED, that this proceeding be and the same is hereby dismissed for lack of jurisdiction."

The Greenstein facts are on all fours with the facts in the present case. In both cases, the first one-half of the real estate taxes was paid in September of the taxable years;

the petitions to the Tax Court were filed within ninety days after October 1 of the taxable years; the last half of the taxes in both cases was paid in March of the taxable years. This Court, by its order dated February 13, 1963 in Greenstein, affirmed without opinion the District of Columbia Tax Court's order of May 10, 1962, which dismissed the case for lack of jurisdiction because the tax involved had not been paid in full. There is absolutely no difference between the two cases.

II

The Tax Court properly rejected the taxpayers' motion to amend their petition so as to include all subsequent tax years which would include the fiscal year 1970

On October 10, 1969, the taxpayers filed a motion for leave to amend the petition which had been previously filed in the Tax Court on December 30, 1968. The purpose of this motion was to have the original petition apply to all fiscal tax years subsequent to the fiscal year 1969. (App. 69-70.)

Rule No. 11(a) of the Rules Of Procedure Before The District Of Columbia Tax Court provides as follows:

> "(a) General.--A motion for leave to amend a pleading shall state reasons for granting it and shall be accompanied by the proposed amendment." (Underscoring supplied.)

The taxpayers did not submit with their motion any specific proposed amendments to their petition. They simply asked for general relief and did not, therefore, comply with the Rules of the Tax Court which relate to amended and supplemental pleadings.

Section 47-702, D.C. Code, 1967, provides as follows:

> "Assessments of real estate in the District of Columbia for purposes of taxation shall be made annually in the same manner and subject to the same limitations as heretofore provided by law for making biennial assessments of real estate in said District." (Underscoring supplied.)

This section of the Code is abundantly clear in that it states that assessments for real estate tax purposes in the District of Columbia are to be made annually and must be so made for each fiscal year. Paragraph (C) of petitioners' motion states as follows:

> "(C) The Petitioners take the position that an adjustment in the assessment by this Court would effectively entitle them to adjustments for all years subsequent thereto which were paid upon the same erroneous assessment." (App. 69.)

In the opinion of counsel for the District this statement, as contained in paragraph (C) of the taxpayers' motion, is in and of itself fatally defective since it apparently assumes, despite the express language of Section 47-702, supra, that there is no difference in assessments made for different fiscal years. Section 47-709 which deals with valuation of real property also calls for annual valuation, not a continuing valuation. That section reads in pertinent part as follows:

> " * * * The valuation of said real property made and equalized as aforesaid shall be approved by the Commissioners not later than July 1, annually, and when approved by the Commissioners shall constitute the basis of taxation for the next succeeding year and until another valuation is made according to law, * * *." (Underscoring supplied.)

The effect of the motion for leave to amend, if it had been granted by the Tax Court, would be to destroy the heart of real estate tax assessments. The very purpose of valuation upon which assessment is based is to allow for the upward and downward variations that real property values undergo in a changing economy. Today, as we all know, real estate values have almost consistently gone upwards at a very fast pace. However, as is well known, there have been times when

the value of real property has also dropped alarmingly. It is not hard to imagine that the taxpayers would never make the argument they do if the present real estate market was in a downward trend since they would be paying taxes on a prior value no longer relevant. The converse of this is also equally true.

The motion for leave to amend the petition is also defective in another area in that it quite candidly states in paragraph (B) of the motion as follows:

> "(B) The Petitioners have not filed a protest concerning the fiscal year 1970 assessment since the assessment was identical to the 1969 assessment which was under protest herein." (App. 69.)

Section 47-2405, D.C. Code, 1967, requires that prior to any appeal from assessment of real property taxes a complaint shall have been first made to the Board of Equalization and Review. By their own admission the taxpayers have not done so, and the effect of the granting of their motion to amend would be to by-pass this requirement of the statute which constitutes an administrative remedy which must be exhausted. The taxpayers did not appeal to the Board of Equalization and Review and have thus failed to exhaust their administrative remedies.

CONCLUSION

Based upon the foregoing it is respectfully submitted:

(1) That this Court should reverse the Tax Court's denial of the District's "Motion To Dismiss" and remand the case with instructions that the petition be dismissed, and

(2) That the decision of the District of Columbia Tax Court, as it relates to the taxpayers' motion for leave to amend, is in all respects correct and in accordance with the law and should be affirmed.

HUBERT B. PAIR
Acting Corporation Counsel, D.C.

HENRY E. WIXON
Assistant Corporation Counsel, D.C.

ROBERT E. MC CALLY
Assistant Corporation Counsel, D.C.

Attorneys for the District of Columbia
District Building
Washington, D.C. 20004

October 12, 1970

APPENDIX

INDEX

DISTRICT OF COLUMBIA TAX COURT

ALLEN BERENTER ALLEN MORRIS MAX LEDER DAVID HORNSTEIN, General Partners of Towne Towers Associates, a Limited Partnership, Principal Office Address: 1420 N Street, N.W. Washington, D.C., Petitioners, v. DISTRICT OF COLUMBIA, Respondent,	)	Counsel: Jules Fink, Esq. Address: 8720 Georgia Ave. Silver Spring, Maryland 20910 DOCKET NO. 2072

DOCKET

Date	Proceedings	Memorandum
1968		Real Estate $8,798.25
Dec 30	Petition filed-Certificate of service.	
1969		
Feb 13	Motion to Dismiss Petition- Certificate of service.	
Feb 24	Petitioners' Opposition to Motion to Dismiss-Certificate of service.	
Jun 19	Ruling and Order on Motion to Dismiss Petition-Certificate of service.	
Aug 1	Stipulation	
Aug 26	Hearing set for September 25-Certificate of service.	

Sept 9	Respondent's motion for extension of time to file Answer-Certificate of service. Motion granted September 10, 1969.
Sept 11	Hearing set over from September 25 to October 20.
Oct 10	Petitioners' Motion for Leave to Amend Petition-Certificate of service.
Oct 14	Answer of Respondent-Certificate of service.
Oct 14	Respondent's Memorandum in Opposition to Petitioners' Motion for Leave to Amend Petition-Certificate of service.
Oct 15	Order Deferring Ruling on Motion for Leave to Amend Petition-Certificate of service.
Oct 20	Hearing-Henry E. Wixon, Esq., and Robert E. McCally, Esq., for Respondent.
Oct 22	Petitioners' Reply to Memorandum in Opposition to Petitioners' Motion for Leave to Amend Petition-Certificate of service.
Nov 10	Final Order of Court.
1970	
Jan 13	Decision-Certificate of service.
Jan 26	Petition for Review filed by Respondent-Certificate of service.
Jan 29	Cross-Petition for Review filed by Petitioners-Certificate of service.
Jan 29	Designation of Record-Certificate of service.

* * * *

FILED
DECEMBER 30, 1968

DOCKET NO. 2072

PETITION

The above named Petitioners appeal from an assessment of taxes against them, and aver as follows:

1. The Petitioners are General Partners of and Agents for Towne Towers Associates, a Limited Partnership, and are duly authorized to bring this action which affects the Limited Partnership property known as Towne Towers Apartments, 1420 N Street, N. W., Washington, D. C., and Aristocrat Apartments, 1440 N Street, N. W., Washington, D. C. The principal office address of the Limited Partnership is 1420 N Street, N. W., Washington, D. C.

2. This Petition is filed to protest a Real Estate Tax Assessment for the fiscal year 1969 made pursuant to Section 47-708, District of Columbia Code. Petitioners have complied with the provision of Title 47-2405 by first filing their complaint with the Board of Equalization and Review. On May 6, 1968, the Board acted upon both Petitions, No. 69-681, Square 212, Lot 29, and Petition No. 69-682, Square 212, Lot 834 by reducing the Assessments proposed for Fiscal Year 1969. The reduction was arrived at by adjusting the assessment of

the buildings by $50,000.00 and $60,000.00 respectively. Copies of the Notices from the Board of Equalization and Review are attached hereto and incorporated herein by reference as Petitioners' Exhibits 1, 2, and 3.

3. For the purpose of clarity, the property referred to by the Board in Petition No. 69-681, i.e., Square 212, Lot 29, contains additional lots 30, 31, 32, 33, 106, 107, 108, the assessed value of which were not changed. This property was improved by a 10-story High-Rise Apartment Building known and hereinafter referred to as the Aristocrat Apartments, located at 1440 N Street, N. W., Washington, D. C.

The property referred to by the Board in Petition No. 69-682, i.e., Square 212, Lot 834, has been given this tax lot number after consolidation. This property was also improved by a 10-story High-Rise Apartment Building known and hereinafter referred to as the Towne Towers Apartments, located at 1420 N Street, N. W., Washington, D. C.

4. The amount of tax in controversy is as follows:

(a) On Towne Towers Apartments: The Petitioners claim excess taxes charged of $3,219.93 per year.

This was arrived at by subtracting from the current assessment of $1,280,581.00, 65% of the owners

appraised value of $1,805,000 (or $1,173,250). The difference of $107,331.00 is multiplied by the current tax rate of $3.00 per $100.00 assessments.

(b) On the Aristocrat Apartments: The Petitioners claim excess taxes charged of $5,578.32 per year.

This was arrived at by subtracting from the current assessment of $1,029,944, 65% of the owners appraised value of $1,360,000 (or $844,000). The difference of $185,944.00 is multiplied by the current tax rate of $3.00 per $100.00 assessment.

Petitioners' total claim of excess taxes charged on both properties is $8,798.25 per year.

5. The Petitioners assign the following errors:

(a) The assessment is based upon a market value established by the Assessors in part on a cost basis. This valuation exceeds that which a fully informed purchaser (acting voluntarily) would pay for the property, because the return would be less than he could obtain on similar investments elsewhere.

(b) The Assessors' valuation is based in part upon two (2) other downtown high-rise apartment sales in the area, and neither sale was an arms length transaction. These two

(2) sales were used by the Assessor after confirming them with adjusted sales comparison of properties located in outlying areas of the City, which areas are not representative of the downtown area.

(c) The basis of the assessment is required by Statute to be at Full and True Value. This has heretofore been construed by the taxing authorities to mean "conservative market value". In this case, the basis of the estimate of market value has been distorted by the Assessors' final estimate of value and hence the assessment which has heretofore been based upon 55% to 65% of fair market value is in excess of these limits.

6. Statement of facts upon which Petitioners rely as sustaining assignments of error are as follows:

(a) The owners contend that the cost method is not legitimate because the income produced by the property would not warrant the costs of constructing the property in todays market.

(b) The owners further contend that the two (2) sale comparisons of downtown apartment buildings are not similar because they were not arms length and both properties are better located than subject property. Oral testimony at

the Hearing before the Board of Equalization and Review fully supported this contention. In addition, sales of similar properties located outside of the downtown area, while indicative of value, are not conclusive enough for the valuation of subject property.

(c) The owners contend that the only valid method for appraising subject properties is the income approach to value, because income producing properties are purchased by investors on the basis of a fair rate of return based upon the cash flow of the property which may be affected by the purchasers' income tax position. Because of the many variations caused by the differences of debt service and income tax considerations of potential investors, the net income before depreciation and debt service is capitalized by a rate desired by investors in similar income producing properties.

(d) At the Hearing before the Board, the owner submitted Appraisals of both properties, dated March 15, 1968. Recognizing that the assessment is based upon the value of the property as of December 31, 1967, the owners offered and the Board accepted from the Appraiser who prepared the appraisals testimony on the adjusted valuations.

To assist the Court and District of Columbia, we have had adjusted appraisals formally prepared, copies of which are attached hereto and incorporated herein by reference as Petitioner's Exhibits 4 and 5.

7. The Petitioners seek the following relief:

(1) A reduction in the assessment of Towne Towers to $1,173,250.00 from $1,280,581.00.

(2) A reduction in the assessment of the Aristocrat Apartments to $844,000.00, from $1,029,944.00.

(3) The Petitioners request such other and further relief as the Court may deem just and proper.

* * * *

EXHIBIT NO. 1

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF GENERAL ADMINISTRATION

FINANCE OFFICE
PROPERTY TAX DIVISION

REPLY TO:
BOARD OF EQUALIZATION AND REVIEW
ROOM 2010 MUNICIPAL CENTER
300 INDIANA AVE., N.W.
WASHINGTON, D. C. 20001

Mr. Jules Fink
Wender Building
2026 Eye Street, N. W.
Washington, D. C. 20006

Petition No. 69-681
Square 212
Lot 29
Date May 6, 1968

Petitioner Allen Bergstar

Dear Mr. Fink:

The Board of Equalization and Review for the District of Columbia, having duly considered the Appeal from Real Estate Assessment of the above-named petitioner, finds that an adjustment in the assessed value of the property described above shall be made as follows:

Assessment Proposed Fiscal Year 1969

Land	Building	Total
$28,055	$850,000	$878,055

Assessment as equalized by the Board of Equalization and Review for Fiscal Year 1969

Land	Building	Total
$28,055	$800,000	$828,055

Very truly yours,

Edward [illegible]
Alternate Chairman
Board of Equalization and Review

Exhibit #1

FP-149 (Rev. 12-67)

EXHIBIT NO. 2

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF GENERAL ADMINISTRATION

FINANCE OFFICE
PROPERTY TAX DIVISION

REPLY TO:
BOARD OF EQUALIZATION AND REVIEW
ROOM 2010 MUNICIPAL CENTER
300 INDIANA AVE., N. W.
WASHINGTON, D. C. 20001

Mr. Jules Fink
Wender Building
2026 Eye Street, N. W.
Washington, D. C. 20006

Petition No. 69-681
Date May 6, 1968

Petitioner Allen Berenter

Dear Mr. Fink:

The Board of Equalization and Review for the District of Columbia, having duly considered the Appeal from Real Estate Assessment of the above-named petitioner, finds that the assessed value of the property is in equal and uniform proportion to other assessments and that the assessed value as determined by the Assessor indicated below, is hereby sustained.

Assessed Value Fiscal Year 1969

Square	Lot	Land	Building	Total
212	30	$29,249	-	$29,249
	31	33,155	-	33,155
	32	34,581	-	34,581
	33	35,991	-	35,991
	106	22,971	-	22,971
	107	22,971	-	22,971
	108	22,971	-	22,971

Very truly yours,

Alternate Chairman
Board of Equalization and Review

Exhibit #2

EXHIBIT NO. 3

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF GENERAL ADMINISTRATION

FINANCE OFFICE
PROPERTY TAX DIVISION

REPLY TO:
BOARD OF EQUALIZATION AND REVIEW
ROOM 3010 MUNICIPAL CENTER
300 INDIANA AVE. N.W.
WASHINGTON, D.C. 20001

Mr. Jules Fink
Wender Building
2026 Eye Street, N. W.
Washington, D. C. 20006

Petition No. 69-682
Square 212
Lot 834
Date May 6, 1968

Petitioner Allen Berenter

Dear Mr. Fink:

The Board of Equalization and Review for the District of Columbia, having duly considered the Appeal from Real Estate Assessment of the above-named petitioner, finds that an adjustment in the assessed value of the property described above shall be made as follows:

Assessment Proposed Fiscal Year 1969

Land	Building	Total
$280,581	$1,060,000	$1,340,581

Assessment as equalized by the Board of Equalization and Review for Fiscal Year 1969

Land	Building	Total
$280,581	$1,000,000	$1,280,581

Very truly yours,

Edward S. Braun
Alternate Chairman
Board of Equalization and Review

[illegible]-149 (Rev. 12-67)

EXHIBIT NO. 4

APPRAISAL REPORT

Aristocrat Apartments

1440 N Street, N.W.

Washington, D.C.

for

Mr. Allen Berenter

as of

December 31, 1967

Petitioners' Exhibit 4

B. F. SAUL CO.

ESTABLISHED 1892

Mortgage Bankers - Realtors

925 FIFTEENTH STREET, N. W. - WASHINGTON, D. C. 20005

NATIONAL 8-2100

November 7, 1968

Mr. Allen Berenter
Box 1103
Rockville, Maryland

RE: Aristocrat Apartments
Washington, D.C.

Dear Mr. Berenter:

As per your request, I have made an appraisal of the above referanced property located at 1440 N Street, N.W. The purpose of the appraisal was to establish a market value. It is my understanding that this appraisal will be used in an appeal of a real estate tax assessment. Therefore, in this instance, I believe the income approach is the most valid method upon which to base an estimate of the present value as of December 31, 1967.

As a result of my computations used in this approach to value, it is my opinion market value in fee, on an unfurnished basis, as of December 31, 1967 is:

ONE MILLION THREE HUNDRED SIXTY THOUSAND DOLLARS

($1,360,000)

This value is based upon a 133 apartment units and 5,800 rental square feet of office space. A 5% vacancy in rent loss allowance yields an effective income of $236,570.

Operating expenses shown in my report are stabilized, based upon the actual expenses of the property listed to reflect normal operating expenses for a downtown apartment house building with a mixture similar to the referenced property. Employee apartments are not shown as income producing; therefore no charges are made in the expenses for employee units. These stabilized expenses differ somewhat from the past expense experience primarily because captioned property has been operated in conjunction with the adjacent Towne Towers Apartments. The stabilized expenses shown are based upon the operation of the building as a single unit.

Ex. #4 (B

An analysis for real estate tax purposes is also in the report.

I am pleased to have had an opportunity to be of service to you.

Sincerely,

Francis E. Dimond

FED/jt

VALUE ESTIMATE

In my opinion, the value of the 133 unit apartment house containing 5,800 sq. ft. of office space located at 1440 K Street, N.W., Washington, D.C. is

ONE MILLION THREE HUNDRED SIXTY THOUSAND DOLLARS

($1,360,000)

Francis E. Dimond

November 6, 1968

The following are comments concerning some of the data, contained in the economic analysis of subject property:

INCOME

Apartment, Parking and Office income was from a schedule furnished by the owner. These rentals are accepted after comparison with the rentals of comparable properties as of Dec. 1, 1967.

EXPENSES

The expense statement has been adjusted to eliminate capital expenditure items, as well as items considered by your appraiser as unnecessary for the operation of the building.

Vacancy - A charge of 5% of Gross Schedule Income is made for vacancy and rent loss. Historically this percentage is low for subject building but is considered average for air-conditioned highrise apartment buildings in Washington.

Management - A charge of 3% of collected rents (Effective Gross Income) was typical for comparable buildings in December, 1967.

CAPITALIZATION RATES

The capitalization rate is composed of two parts: Overall Capitalization Rate indicating a value at which subject would sell, plus a capitalization rate reflecting the real estate tax in the District of Columbia.

A normal Capitalization Rate as of December, 1967, would range from a low of 8.75% to a high of 9.25%. In this case your appraiser uses the lower end of the range or 8.75%.

The tax rate for subject in December, 1967 was $2.90 per $100 of assessment. Assessments on an average were based on 65% of market value. Capitalization rate for real estate taxes is therefore computed (on the next page) as follows:

$$\frac{\$2.90 \times 65\%}{100} = 1.885\%$$

Add overall rate as above	8.75%
Total Capitalization Rate	10.635%
Using	10.65%

ECONOMIC ANALYSIS

Gross Apartment Income per Exhibit A.	$ 204,900
Income from Office Space	30,000
Income from Parking Space	11,220
Laundry and Miscellaneous	2,900
Total Gross Schedule Income	$ 249,020
Less Vacancy and Rent Loss Allowance (5%)	- 12,450
Effective Gross Income	$ 236,570
Less expenses per Exhibit B	- 92,005
Net Income Before Depreciation	$ 144,565
Capitalized @ 10.64% including Real Estate Taxes, Interest, Depreciation	$1,357,417

ESTIMATED VALUE $1,360,000

TAX ANALYSIS

Taxes can be computed in the following manner:

Value	$1,360,000
Indicated Assessment @ 65%	$ 884,000
1967 Tax Rate per $100 assessment	$2.90
Indicated Taxes	$25,636.00

If taxes of $25,636 are added to the expenses shown in Exhibit B, expenses total $117,641. These expenses yield a net income of $118,929 which capitalized at 8.75% yields an indicated value of $1,359,188, which is rounded to $1,360,000.

EXHIBIT A

Schedule of Monthly Apartment Rents on an Unfurnished Basis As of December 31, 1967

T I E R N U M B E R

Floor	1 Eff.	2 Eff.	3 Eff.	4 Eff.	5 Eff.	6 1 Bdr.	7 Eff.	8 Eff.	9 Eff.	10 Eff.	11 Eff.	12 Eff.	14 Eff.	15 Eff.	16 Eff.	Total
2	$118	$124	$124	$126	$126	$170	$127	$124	$124	$126	$126	$126	$118	$126	$125	1,910
3	Free	125	125	128	122	178	120	127	125	124	124	128	123	122	128	1,799
4	125	120	128	128	125	175	127	127	127	130	128	127	125	124	122	1,938
5	125	125	128	128	128	175	128	128	125	124	130	128	127	128	128	1,955
6	125	125	128	128	129	188	128	129	128	225	(combined)	129	127	128	128	1,945
7	128	125	126	130	130	180	130	130	130	128	130	130	130	130	125	1,982
8	128	124	130	126	126	Free	130	130	130	130	125	128	128	130	130	1,795
9	128	128	126	131	131	195	130	130	128	130	130	130	130	130	131	2,008
10	129	129	126	x	x	160	149	132	130	132	132	132	130	132	130	1,743
TOTALS	1,006	1,125	1,141	1,025	1,017	1,421	1,169	1,157	1,147	1,249	1,025	1,158	1,138	1,150	1,147	17,075

Total Annual Rental $204,900

EXHIBIT B
STABILIZED EXPENSES

Management		
Advertising	$ 3,000	
Management Fee (3%)	7,100	
Resident Managers	3,900	
Miscellaneous	100	
Total Management		$ 14,100
Operating Services		
Accounting, legal	$ 750	
Electricity	15,250	
Exterminating	175	
Fuel	2,800	
Gas (cooking)	1,200	
Janitorial Service	2,600	
Miscellaneous	1,500	
Salaries	29,660	
Swimming Pool	1,300	
Telephone	1,500	
Trash	850	
Water	2,000	
Total Operating Services		59,585
Repairs and Maintenance		
Air conditioning, Heat	$ 500	
Decorating	3,500	
Electrical Repairs	200	
Elevator Contract	2,000	
Other Repairs	4,000	
Janitorial Supplies	1,500	
Total Repairs		11,700
Insurance and Taxes		
Insurance	$ 2,500	
Payroll Taxes	3,620	
Personal Property Taxes	500	
Total Insurance and Taxes		6,620
TOTAL OPERATING EXPENSES		$ 92,005

EXHIBIT NO. 5

APPRAISAL REPORT

Towne Towers Apartments

1420 N Street, N.W.

Washington, D.C.

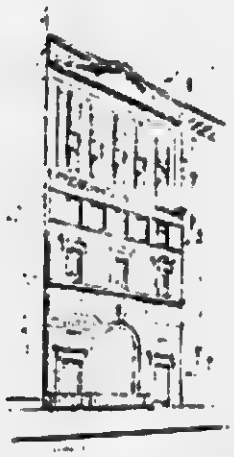
for

Mr. Allen Berenter

as of

December 31, 1967

Petitioners' Exhibit 5



B.F.SAUL CO.

ESTABLISHED 1892

Mortgage Bankers - Realtors

925 FIFTEENTH STREET, N. W. - WASHINGTON, D. C. 20005

NATIONAL 8-2100

November 7, 1968

Mr. Allen Berenter
Box 1188
Rockville, Maryland

RE: Towne Towers Apartment
Washington, D.C.

Dear Mr. Berenter:

As per your request, I am enclosing an apprisal on the above referenced property. The purpose of the apprisal was to establish a fair market. It is my understanding that you plan to use this appraisal in an appeal of your recent real estate tax assessment increase. Therefore, in this instance I believe the income approach is the most valid method in which to base an estimate of the present value.

As a result of my computations by this approach to value, it is my opinion the market value fee on an unfurnished basis as of December 31, 1967 is:

ONE MILLION EIGHT HUNDRED FIVE THOUSAND DOLLARS

($1,805,000.00)

The market value is based upon a 141 apartment units and 10,350 rental square feet of office area. No charges were made in the expenses for employee units since they were not shown as income producing. A 5% vacancy in rent loss allowance yields an effective income $297,520. The stabilized expenses contained within my report before real estate taxes amount to $105,390. This differs somewhat from your past expenses primarily because the property has been operated in conjunction with the adjacent Aristocrat Apartments. I have therefore stabilized my expenses to reflect normal expenses necessary for the operation of a downtown apartment house.

Following an economic anaylsis of the property is an anaylsis of the real estate taxes.

I am pleased to have had an opportunity to be of service to you.

Sincerely,

Francis E. Dimond

FED/jt

VALUE ESTIMATE

In my opinion, the value of the 141 unit apartment house containing two floors of commercial space located at 1420 N Street, N.W., Washington, D.C., is

ONE MILLION EIGHT HUNDRED FIVE THOUSAND DOLLARS

($1,805,000.00)

Francis E. Dimond

November 6, 1968

51

The following is an economic analysis of income and expenses of subject. The following are comments concerning some of the data:

INCOME

Apartment, Parking, and Office income was from a schedule furnished by the owner. These rentals are accepted after comparison with the rentals of comparable properties as of December 31, 1967.

EXPENSES

The expense statement has been adjusted to eliminate capital expenditure items; as well as items considered by your appraiser as unnecessary for the operation of the building.

In addition your appraiser has eliminated from the income one apartment unit as an employee unit. Because this building is operated in conjunction with the adjacent apartment building it has not been necessary to provide two employee units. However anyother owner of the property would have to provide two units.

Vacancy - A charge of 5% of Gross Schedule Income is made for vacancy and rent loss. Historically this percentage is low for subject building but is considered average for airconditioned highris apartment buildings in Washington.

Management - A charge of 3% of collected rents (Effective Gross Income) was typical for comparable buildings in December, 1967.

CAPITALIZATION RATES

The capitalization rate is composed of two parts: Overall Capitalization Rate indicating a value at which subject would sell, plus a capitalization rate reflecting the real estate tax in the District of Columbia.

A normal capitalization rate as of December, 1967, would range from a low of 8.75% to a high of 9.25%. In this case your appraiser uses the lower end of the range or 8.75%.

The tax rate for subject in December, 1967 was $2.90 per $100 of assessment. Assessments on an average were based on 65% of market value. Capitalization rate for real estate taxes is therefore computed as follows:

$$\frac{\$2.90 \times 65\%}{100} = 1.885\%$$

Add overall rate as above	8.75%
Total Capitalization Rate	10.635%
Using	10.65%

ECONOMIC ANALYSIS

Gross Apartment Income (Exhibit A)	$247,920
Income from Office Space	49,680
Income from Parking Space	12,480
Laundry and Miscellaneous	3,100
Total Gross Scheduled Income	$313,180
Less 5% for Vacancy and Rent Loss	- 15,660
Effective Gross Income	$297,520
Less Expenses per Exhibit B	-105,390
Net Income Before Depreciation	$192,130

Capitalized @ 10.65%

Including Taxes, Interest and Depreciation $1,804,038

ESTIMATED VALUE $1,805,000

TAX ANALYSIS

Taxes can be computed in the following manner:

Value	$1,805,000
Indicated Assessment @ 65%	1,173,250
1967 Tax Rate per $100 Assessment	$2.90
Indicated Taxes	$34,024.25

If taxes of $34,025 are added to the expenses shown in Exhibit B, total expenses total $139,415. These expenses yield a net of $158,105 which capitalized at 8.75% yields an indicated value of $1,806,914, which is rounded to $1,805,000.

EXHIBIT A

SCHEDULE OF MONTHLY APARTMENT RENTS ON AN UNFURNISHED BASIS AS OF DECEMBER 31, 1967

T I E R N U M B E R

Floor	1 Br. 01	Jr.1 02	Jr.1 03	Jr.1 04	Jr.1 05	Jr.1 06	Jr.1 07	1 Br. Eff. 08	Eff. 09	Eff. 10	Eff. 11	1 Br. 12	Eff. 13	Eff. 14	Eff. 15	Eff. 16	TOTALS
2	$190	$149	$149	$149	$149	$149	$149	$193	$126	$124	$124	$190	$120	$125	$124	$120	2,330
3	193	154	140	149	140	149	149	196	128	126	127	196	127	128	128	128	2,358
4	193	149	149	149	149	Free	Free	196	128	128	124	196	123	120	125	125	2,054
5	193	149	154	149	149	154	149	196	128	127	127	196	128	127	125	120	2,371
6	197	149	149	149	149	149	149	196	128	126	126	196	123	129	130	124	2,369
7	195	152	154	149	152	152	149	198	130	130	128	198	123	123	125	129	2,387
8	195	149	152	140	149	152	152	198	130	126	129	198	123	123	132	124	2,372
9	195	152	152	140	142	152	152	205	130	128	128	198	123	123	128	130	2,378
10	200	154	140	154	154	156	156	205	134	128	130	205	125	X	X	X	2,041
TOTALS	1,751	1,357	1,339	1,328	1,333	1,213	1,205	1,783	1,162	1,143	1,143	1,773	1,115	998	1,017	1,000	20,660

Total Annual Rental $247,920

NOTE: Apt. 407 is shown as employee unit for stabilization only. At present, it is leased at $149.00 per month. An extra employee unit is not necessary because this project is operating in conjunction with the adjacent Aristocrat Apartments.

EXHIBIT B
STABILIZED EXPENSES

Management		
Advertising	$ 3,000	
Management Fee (3%)	8,925	
Resident Managers	3,900	
Miscellaneous	150	
Total Management		$ 15,975
Operating Services		
Accounting, Legal	$ 800	
Electricity	19,500	
Exterminating	225	
Fuel	3,900	
Gas (cooking)	1,300	
Janitorial Service	4,660	
Miscellaneous	2,000	
Salaries	29,660	
Swimming Pool	1,300	
Telephone	1,500	
Trash	950	
Water	2,100	
Total Operating Services		67,895
Repairs and Maintenance		
Air Conditioning, Heat	$ 500	
Decorating	5,500	
Electrical Repairs	200	
Elevator Contract	2,000	
Other Repairs	4,500	
Janitorial Supplies	1,700	
Total Repairs		14,400
Insurance and Taxes		
Insurance	$ 3,000	
Payroll Taxes	3,620	
Personal Property Taxes	500	
Total Insurance and Taxes		7,120
TOTAL OPERATING EXPENSES BEFORE R.E. TAXES		$105,390

FILED
FEBRUARY 13, 1969

DOCKET NO. 2072

MOTION TO DISMISS PETITION

Respondent District of Columbia moves the Court to dismiss the petition filed in the above-entitled case on the ground that it does not appear from the petition that the Court has jurisdiction to hear and determine the same.

The basis for this motion is that the petition does not allege as required by Rule 7 of the Rules of Procedure Before the District of Columbia Tax Court, as supplemented by Appendix A to the forms attached to said rules, that the real property taxes alleged to be in controversy were paid by petitioners in full prior to the filing on December 30, 1968 of the petition with this Court, which said payment, pursuant to D.C. Code, section 47-709 (see also summary in D.C. Code, section 47-2405) and Greenstein v. District of Columbia, D.C.T.C. Order dated 5/10/62 (affirmed without opinion by the United States Court of Appeals for the District of Columbia Circuit on February 13, 1963), is a jurisdictional prerequisite to the maintaining of this proceeding. See also District of Columbia v. McFall, 88 U.S. App. D.C. 217, 188 F.2d 991 (1951).

* * * *

FILED
FEBRUARY 24, 1969

DOCKET NO. 2072

PETITIONERS OPPOSITION TO MOTION TO DISMISS

Petitioners, through their attorney of record, Jules Fink, move the Court to deny Respondent's Motion to Dismiss Petition and as grounds therefor state as follows:

1. The sole basis for the Motion concerns itself with the jurisdiction of this Court to hear the appeal, because of the failure of the Petitioners to pay the tax in full.

2. To the extent of the Petition's omission of any allegation of payment, Petitioners move to amend the Petition nunc pro tunc to show that as a matter of fact one-half of the taxes were paid on September 30, 1968, in the amount of $19,208.72 as to Towne Towers Apartments, Lot 834, Square 212, and in the cumulative total amount of $15,499.20 as to the Aristocrat Apartments, Lots 29, 30, 31, 32, 33, 106, 107 and 108, in Square 212. Both of these properties were improved by Ten-Story High-Rise Apartment Buildings, bearing street addresses 1420 and 1440 N Streets, N.W., Washington, D.C., respectively.

3. Based upon the representations to counsel for Respondent, as to the payment of one-half of the taxes, counsel have agreed to stipulate to this fact as having been in

existence at the time of the filing of the Petition herein. Counsel for Respondent has informed counsel for Petitioners that it has no objection to the retroactive amendment to reflect the actual fact of payment of one-half of the taxes due.

4. Title 47-709 of the District of Columbia Code provides in pertinent part that "... any person aggrieved by any assessment, equalization, or valuation made within 90 days after October 1 of the year in which such assessment, equalization, or valuation is made, appeal from such assessment, equalization, or valuation in the same manner and to the same extent as provided in Sections 47-2403 and 47-2404; Provided, however, that such person shall have first made his complaint to the Board of Equalization and Review respecting such assessment as herein provided...". There is no question that the appeal was timely filed at the time the complaint was first made to the Board of Equalization and Review and decided by that Board.

Title 47-2405 states in pertinent part that as to appeals of real estate assessments ..."they shall be made in the same manner and to the same extent as provided in Sections 47-2404"...which sections refer to the language in Title 47-2403 which states in pertinent part "any person aggrieved by any assessment against him of any personal-property, inheritance,

estate, business-privilege, gross-receipts, gross-earnings, insurance-premiums, or motor-vehicle-fuel tax or taxes, or penalties thereon, may within ninety days after notice of such assessment, appeal from such assessment to the Board, provided such person shall first pay such tax, together with penalties and interest due thereon - - - The Board of Tax Appeals was designated as the District of Columbia Tax Court.

5. The real estate tax bill rendered by the District of Columbia to the Petitioners was issued in two parts and designated as the First-half and Second-half tax bill. The first-half taxes must be paid in September of the year rendered and in this case were in fact paid. The second-half bill is by its own terms not yet due (Section 47-1209, D. C. Code).

In light of the foregoing, Petitioners contend that their payment was payment in full for jurisdictional purposes of the Tax Court.

6. Title 47, Section 2405 concerning the appeals of real estate assessments does not require a payment of a tax not due in order to appeal from such assessment. It likewise does not refer to any other section of the Code requiring such payment.

7. No legal, logical or rational reason can be advanced for requiring the payment of taxes in advance as a jurisdictional pre-requisite for appeal to the District of Columbia

Tax Court. To require such advance payment would deprive tax payers of constitutional safeguards since the Petitioners have exhausted their administrative remedies.

8. The District of Columbia in authorizing the payment of the tax in installments is estopped to now assert that this payment is not compliance in full with the Statute.

9. Petitioners allege alternatively that the payment by them of one-half of the taxes entitles them to have their appeal considered minimally as to that half of the taxes which were paid.

WHEREFORE, the premises considered, your Petitioners respectfully submit that the Motion to Dismiss should be denied.

* * * *

FILED
JUNE 19, 1969

DOCKET NO. 2072

RULING AND ORDER ON MOTION TO DISMISS PETITION

The petitioners seek review of two real estate tax assessments determined by Board of Equalization and Review decision of May 6, 1968 covering the fiscal year 1969 -- July 1, 1968 to June 30, 1969. Taxpayers paid the first half of the taxes resulting from the assessments, totalling

$34,707.92, on September 30, 1968. Their petition was filed December 30, 1968. Respondent's motion was filed February 13, 1969. It seeks dismissal of the petition because the total taxes due as a consequence of the assessments had not been paid "in full" prior to the filing of the petition. Respondent contends that unless the taxpayer has paid the taxes in full, the Tax Court lacks jurisdiction to entertain the petition.

Petitioners claim, in their opposition filed February 24, 1969 to the motion to dismiss, that respondent, by authorizing payment of real estate taxes in two installments, "is estopped to now assert that this payment is not compliance in full with the Statute". In this connection, official notice is taken of D. C. forms FP-176A (Rev. 3-68) and FP-177 (Rev. 8-68) which state in pertinent part, respectively:

> First Half Due by Sept. 30, 1968
>
> This bill is for real estate taxes due for the period July 1, 1968 to June 30, 1969.
>
> Total tax may be paid with this bill. If total tax is not paid, you will receive a bill for second half tax due March 31, 1969.
>
> * * * * * *
>
> 1969 Second Half Tax Due by March 31, 1969
>
> After Sept. 30, 1968, 1st half tax is increased by 1% per month until paid.

After March 31, 1969, 2nd half tax will be increased by 1% per month until paid.

Official notice is also taken of the fact that in all modern times, real estate tax bills issued by the District of Columbia have been payable in two equal installments -- September and March -- purusant to provisions in the bill forms similar to those above set out.

In addition to the claim of estoppel by explicit authorization and representation, the February 24, 1969 opposition to the motion to dismiss asserts, in substance, that (1) since the "second-half bill is by its own terms not yet due", the payment of the first-half on September 30, 1968, was "payment in full for jurisdictional purposes of the Tax Court"; that (2) there is no statutory or other reason why an appeal of real estate assessments must be preceded by "payment of a tax not due" or "payment of taxes in advance"; finally, that (3) at least, the payment as made entitles petitioners to be heard on their claim for refunds based on one-half of the taxes assessed.

Statutory provisions, according to the D. C. Code.

The statutory basis for respondent's motion would ordinarily be traced through the labyrinth of Title 47 of the D. C. Code, "Taxation and Fiscal Affairs". Taking respondent's

motion at face value, we might expect to there find a provision, in the sections dealing with review by the Tax Court of real estate tax assessments, requiring that the resulting real estate taxes be paid in full, whether or not due, before petition for review is filed. Putting aside for the moment the likelihood or equity of such a provision, we might expect to find a provision something like this: "in the event that the taxpayer expects to seek review of the assessment in the D. C. Tax Court, total tax must be paid by September 30th of the year for which tax is assessed". But the D. C. Code says nothing of the kind.

In order to personalize the actual situation, let us imagine a hypothetical careful researcher, believing himself aggrieved by real estate assessments, who undertakes to find his appeal rights by tracing through the multitude of cross-references in the Code. As we shall later find out, the actual basis for respondent's motion lies in a secret flaw in the Code: a cross-reference is misnumbered in the Code, when the Code is compared to the basic statute. But the purpose of this tracing process is to lay the foundation for judging petitioners' defenses to the motion, all of which actually sound in estoppel.

The careful researcher would first rely on the provisions of Code section 47-2405, entitled "Appeals of real estate assessments". 47-2405 states in pertinent part that taxpayers "aggrieved by any assessment, equalization, or valuation made pursuant to sections 47-708 and 47-709, may within ninety days after October 1 of the year in which such assessment, equalization, or valuation is made, appeal from such assessment, equalization or valuation in the same manner and to the same extent as provided in sections 47-2404 and 47-2413", on condition that the taxpayers have first complained to the Board of Equalization and Review (with an immaterial exception). Our researcher might well first recheck, to make certain that taxpayers were complaining of valuations made under sections 47-708 and 47-709.

Sections 47-708 and 47-709 respectively provide for the "Board of Equalization and Review - Annual meeting - Notice of meetings - Duties" and "Valuation of real property to be complete on the first Monday of May annually". In general, these sections authorize the Board to sit in review of assessments from the first Monday of January to the first Monday of April of each year; the valuations and equalizations to be completed by the first Monday in May of each year

and then to be approved by the D. C. Commissioner not later than July 1 of that year, after which such valuation "shall constitute the basis for taxation for the next succeeding year and until another valuation is made according to law" --

> except as hereinafter provided. Any person aggrieved by any assessment, equalization, or valuation made may within ninety days after October 1 of the year in which such assessment, equalization or valuation is made, appeal from such assessment, equalization or valuation in the same manner and to the same extent as provided in sections 47-2403 and 47-2404: Provided, however, That such person shall have first made his complaint to the Board of Equalization and Review * * * (with an immaterial exception).

At this point, the researcher might well pause, take breath, remember that taxpayers in the case at bar had complied with what seems to be the essential conditions -- complaint to the Board of Equalization and Review -- and therefore, under lead section 47-2405, supra, may appeal their 1969 assessments within 90 days after October 1, 1968 as there set out: "in the same manner and to the same extent as provided in sections 47-2404 and 47-2413". He then looks at these last two sections to find the "manner and extent" of his rights to appeal.

Neither section contains any applicable limitations. Section 47-2404 discursively pertains to reviews of

decisions of the D. C. Tax Court by "the court" -- never explicitly named, but which, by necessary implication from oblique references[1/] must be the U. S. Court of Appeals for the District of Columbia Circuit. We are now concerned with an appeal to the Tax Court, not an appeal from the Tax Court.

Section 47-2413, titled "Overpayments - Board of Tax Appeals" [now, D. C. Tax Court], provides principally for refund of overpayments of tax after timely claims for refund filed with the Assessor, now the Department of Revenue and Finance. It also gives the Tax Court jurisdiction "to determine whether there has been any overpayment of tax and to order that such overpayment be credited or refunded to the taxpayer" if a timely refund claim has been filed; i.e., jurisdiction over appeals from adverse action or nonaction by the Department of Revenue and Finance. Specifically, "the taxpayer may appeal to the Board [Tax Court], in the same

---

1/ "The court" is to have exclusive jurisdiction to review Tax Court decisions "in the same manner and to the same extent" as decisions of the U. S. District Court for D. C. "in civil actions tried without a jury"; the judgment of "the court" to be final "except that it shall be subject to review by the Supreme Court of the United States upon certiorari" as provided in 28 U.S. Code sec. 1254.

manner and to the same extent as set forth in sections 47-2403 and 47-2404". However, also specifically, this principal subsection outlining the Tax Court's jurisdiction "shall not apply to the real estate tax". D. C. Code, section 47-2413, subsection (a).[2/] (Emphasis added.)

Our hypothetical careful researcher has now completed his research, perhaps also including the "Notes to Decisions" in the Code, as set out following the text of sections 47-2405, 47-708 and 709, and 47-2404 and 47-2413. He has found nothing in the text of the Code or the notes to the decisions to indicate that payment in full is required before he can

---

2/ Equally, subsection (a) specifically does not apply to "the taxes imposed by sections 47-1501 to 1548 (Income Tax for Taxable Years Prior to January 1, 1947; under which the taxpayer may appeal income tax assessments to the then Board of Tax Appeals "in the same manner and to the same extent as set forth in sections 47-2403, 47-2404, 47-2407 to 47-2412" (section 47-1531)]; by sections 47-1551 to 47-1595 [Income and Franchise Taxes for Taxable Years After January 1, 1947; under which the provisions of the prior act were not repealed insofar as they dealt with "allowance of refunds of overpayments" (section 47-1551(e)), and under which the taxpayer may also, as in the prior act, appeal income tax assessments on the basis quoted above in this footnote, (section 47-1593)]; or by sections 47-2601 to 47-2629 and 47-2701 to 47-2713 [Gross Sales Tax, containing exactly the same references (section 47-2618), and Compensating Use Tax, in which "The provisions of sections 47-2616 to 47-2622 and 47-2624 to 47-2629 are hereby incorporated in and made applicable to this chapter" (section 47-2713); i.e., section 47-2618 of the Gross Sales Tax law is incorporated by reference].

take his complaint to the Tax Court. He bears in mind the statute of limitations on the filing of his appeal pursuant to lead section 47-2405: "within ninety days after October 1 of the year in which such assessment, equalization, or valuation is made". His deadline is December 30th, and in the case at bar, the deadline is met by petition filed December 30, 1968. At that time, under the plain text of the Real Estate Tax Bill forms, the "First Half Tax" was due by, and had been paid on, September 30, 1968; the "Second Half Tax" was due by March 31, 1969, i.e., not yet due at the time the statute of limitations ran out on the filing of his appeal to the Tax Court (December 30, 1968). Our researcher, after several hours with the Code, is satisfied that taxpayer's appeal rights have been protected. There is nothing to alert him to the possibility that the Code does not correctly codify the law.

Real Basis of Respondent's Motion. Prepayment of the last half of the taxes, according to the motion paper, "is a jurisdictional prerequisite to the maintaining of this proceeding" under the provisions of "D. C. Code, section 47-709 (see also summary in D. C. Code, section 47-2405) and Greenstein v. District of Columbia, D.C.T.C. Order dated

5/10/62 (affirmed without opinion by the United States Court of Appeals for the District of Columbia Circuit on February 13, 1963)".

As we have seen, Code 47-709 is in fact cross-referenced to 47-2403, which in substance, as we shall see, makes payment of tax a prerequisite to appeal of assessments. The subject of 47-709 is "Valuation of real property to be complete on the first Monday of May annually". It deals with valuation of real property and approval by the Commissioners, now the Mayor. It does not alert the taxpayer, or his careful researcher, to a possible flaw in the section 47-2405 cross-references dealing with the subsequent action he has in mind: the appeal "in the same manner and to the same extent as provided in sections 47-2404 and 47-2413".

In Greenstein, Docket No. 1785, the petition was filed December 28, 1961, seeking review of real estate assessments for the fiscal year 1962. The first half of the resulting real estate taxes had been paid September 26, 1961, and the last half was paid on March 19, 1962. The case was heard and decided on May 10, 1962 at the conclusion of petitioners' opening statement, with the following written order:

> It appearing to the Court that the petitioners failed to pay the entire taxes here involved prior

> to the filing of the petition herein on December 28, 1961, it is by the Court this 10th day of May, 1962,
>
> ORDERED, that this proceeding be and the same is hereby dismissed for lack of jurisdiction.

The transcript of proceedings disclose the reason for the ruling. Counsel for petitioners, asked by the Court as to the law on his "privilege of appeal", cited Code section 47-2405, supra, which gives him an appeal in the same manner and to the same extent as provided in sections 47-2404 and 47-2413 "and neither of these sections makes reference to the payment of the tax". (Tr. 13-14.)

Counsel for the District discloses the flaw, deemed to be fatal to petitioners:

> I think there is an error in the Code Sections as so often happens. They include the wrong sections. (Tr. 14.)

As the Court then points out, Code section 47-2405 codifies subsection (a) of section 5 of Title 9 of the Revenue Act of 1937, as amended by the Act of June 10, 1952, which provides for -

> Appeal from such assessment, equalization, or valuation in the same manner and to the same extent as provided in Sections 3 and 4 of this title. (Tr. 14-15.)

Sections 3 and 4, thus referred to, are sections 47-2403 and 47-2404 of the Code -- not sections 47-2404 and 47-2413.

The Court says (Tr. 19-20) "I am not going by the Code. I am going by the law. * * * The Codification is not a law. It is just a matter of convenience. * * * The Code is all wrong. There is an Act in Congress right at this point to correct the Code in various sections, the mistakes they have made. It is up there right now."

A somewhat significant sidelight on the Court's view that there is no jurisdiction to consider petitioners' case, unless the entire real estate tax has been paid within 90 days from October 1 of the tax year, is the thought that "It is a privilege to come to the Tax Court instead of going through the Courts. * * * [Taxpayer] can always go into Court. * * * No reason why he could not go into the District Court and attack this tax * * * [however] It is not a right to proceed in this Court. It is a privilege and you have got to comply with the law, and I have got to comply with the law, too. * * * The 1951 Code was correct but someone, whoever wrote this Code, made this mistake." (Tr. 22, 23, 24.)

On June 7, 1962, petitioners appealed to the U. S. Court of Appeals for the District of Columbia Circuit, which affirmed <u>per curiam</u> (Edgerton, Danaher and Bastian, J.J.) on

February 13, 1963, as follows (CADC docket no. 17,169)-

> This case came on to be heard on the record from the District of Columbia Tax Court, and was argued by counsel.
>
> On Consideration Whereof, it is ordered and adjudged by this court that the order of said Tax Court on review herein is affirmed, with costs.

Respondent's motion is prima facie well taken for, the Greenstein facts are on all fours with the facts at bar: first one-half of real estate taxes paid in September of the taxable year; petition to the Tax Court filed within ninety days after October 1st of the taxable year; last half of the taxes paid (in Greenstein, and presumably in the case at bar) in March of the taxable year. Held and affirmed: the Tax Court has no jurisdiction to consider the petition because it was filed before the "entire taxes" had been paid. But the authority of the Greenstein case rests on a painstaking search of the transcript and record there made. There are no findings, no conclusions (except the ultimate conclusion), no opinion or decision explaining the action taken. Apparently no briefs were filed in the Court of Appeals; the points advanced on oral argument are not known. The matter is not conclusively settled, A.L.I. Restatement of the Law of Judgments, 1942, p. 319:

> Under the doctrine of stare decisis, when a court has in one case decided a question of law it will in subsequent cases in which the same question of law arises ordinarily decide it in the same way. The doctrine is not rigidly applied, and a court will sometimes overrule its prior decisions. * * *

The rationale of the Greenstein decision, so far as we can tell, rests on the assumption that it is a "privilege" to come to the Tax Court for relief, and that taxpayers can always pursue their remedies in the other courts of the District of Columbia. If this is so, it is a practical and facile means of disposing of the motion: grant the motion on the basis of the precedents, and remit the petitioner to his remedy in the U. S. District Court for the District of Columbia. But the assumption bears examination.

Petitioners' Remedy in Other Courts. As we have seen, the researcher has had his attention drawn to Code section 47-2413 "Overpayments - Board of Tax Appeals" and has found out that the qualifications there "shall not apply to the real estate tax". If he reads on, the researcher will find a much broader provision in subsection (c) --

> The remedies provided to the taxpayer under this chapter shall not be deemed to take away from the taxpayer any remedy which he might have under any other provision of law, but no suit for the recovery of an overpayment of any tax shall be instituted in any court if the

> taxpayer has elected to file an appeal with respect to such overpayment with the Board of Tax Appeals for the District of Columbia under this chapter.

Note that the rule laid down in this subsection applies to the entire Chapter 24, "District of Columbia Tax Court", of Title 47. Taxpayer here "has elected to file an appeal with respect to" an asserted overpayment with the Tax Court. If the words of subsection (c) are given effect, taxpayer may not, on dismissal of his Tax Court proceeding, air his claim "in any court". He is thus left without recourse to any judicial or administrative reviewing body for a determination of his claim against the action of the assessing authorities which deprived him of tax dollars. A constitutional question is obvious; how to avoid the question is not so clear.

D. C. v. Brady, 109 U.S. App. D.C. 324, 288 F.2d 108, involved the taxpayer's liability for unincorporated business franchise taxes paid under protest for the years 1952-1956. As in the case of other D. C. taxes, a taxpayer aggrieved the determination of the Department of Finance and Revenue "may, within ninety days from the date of the assessment of the deficiency or from the date of the denial of a claim for refund, as the case may be, appeal to the Board of Tax

Appeals for the District of Columbia, in the same manner and to the same extent as set forth in sections 47-2403, 47-2404, 47-2407 to 47-2411". D. C. Code, sec. 47-1593.

Section 47-2403, pertaining to personal property, inheritance and other specific taxes, as we have seen, provides that an aggrieved taxpayer may appeal to the "board", i.e. the Board of Tax Appeals, now the Tax Court, within 90 days after notice of assessment, "provided such person shall first pay such tax".

Also following the statutory pattern for other taxes, D. C. Code sec. 47-1593a provides for "Election of remedy":

> The remedy provided in section 47-1593 shall not be deemed to take away from the taxpayer any remedy which he might have under any other provision of law, but no suit by the taxpayer for the recovery of any part of any tax shall be instituted in any court if the taxpayer has elected to file an appeal with respect to such tax in accordance with the provisions of section 47-1593. (July 16, 1947, 61 Stat. 359, ch. 258, Art. I, title XV, §2.)

In Brady, all nine judges, en banc, concurred that taxpayer properly took his case to the U. S. District Court as one of his options. In the language of the majority opinion (109 U.S. App. D.C. at 326-327, footnotes omitted):

> * * * Common-law remedies survive unless the administrative remedy is prescribed, i.e., required. The D. C. Code merely provides such

> a remedy; it does not prescribe it. Before statutes provided recourse to administrative boards, actions in the nature of assumpsit for money had and received were available for recovery of taxes. Clearly Congress can proscribe a common-law right of action; and, conversely, it can prescribe an exclusive administrative remedy. But the D. C. Code does neither; it carefully spells out that the administrative remedy which it provides "shall not be deemed to take away from the taxpayer any remedy which he might have under any other provision of law." Thus the taxpayer is now permitted recourse to either an administrative remedy or a common-law suit for recovery of District of Columbia taxes.
>
> Moreover, under the Code, the ultimate exhaustion of the administrative remedy, i.e., a decision by the Tax Court, an "independent agency" in the District Government, or indeed even the filing of an appeal with that Court, precludes the taxpayer from filing suit under his common-law remedy. If the exhaustion of the administrative remedy is a bar to a common-law action, a fortiori it can in no sense be a condition precedent to such a suit.
>
> We conclude that Dr. Brady's failure to exhaust his administrative remedy did not preclude his bringing action in the District Court.

Although not clear, the language of the opinion indicates that "indeed even the filing" of an appeal to the Tax Court precludes recourse to the District Court; i.e., that a petition to the Tax Court dismissed for want of jurisdiction cannot be heard at all. And this, in the case of a tax which in all material considerations is exactly like the real estate tax:(1) appeal in the same manner and to the

same extent as set forth in, inter alia, Code sections 47-2403 and 47-2404, and (2) an option to elect either the common-law remedy in the other courts of the District, or to go to the D. C. Tax Court. (Sections 47-1593 and 47-1593a, supra.) Brady thus indicates that petitioners in the case at bar are without any right of review of their claim in the common-law courts if their right to proceed in the Tax Court is denied. Such a construction of the tax statute is certainly not to be favored.

"* * * shall first pay such tax." If Code section 47-2403 governs the disposition of the case at bar despite the fact that it is not referred to in lead section 47-2405, does the clause "provided such person shall first pay such tax, together with penalties and interest due thereon, to the collector of taxes of the District of Columbia" mean "pay such [real estate] tax [in full, whether or not due]?

Industrial Bank of Washington v. D. C., 88 U.S. App. D.C. 233, 188 F.2d 46, involved an appeal from Docket No. 1012 of this Court. From an examination of the papers in that Docket, it appears that petitioner (1) filed its return of gross earnings tax for the fiscal year 1947 on December 20, 1946, (2) received a tax bill January 17, 1947, of

$4,922.92 payable first half February 17, 1947 and second half March 19, 1947, and (3) paid the first half, $2,461.46, on February 13, 1947.

On March 14, 1947, petition was filed claiming that the assessment was on an erroneous basis, and excessive. On March 17, 1947, the remaining one-half of the tax was paid. The Board of Tax Appeals agreed with petitioner's contention in substance, and allowed a refund on the first half of taxes paid, and also made a finding, quoted in the decision of the Court of Appeals, that the second half payment was not subject to reduction, because it was "not accompanied by, or followed by a protest in writing." Further proceedings, including the appeal, centered on the Board's conclusion, based on this finding, that it had no jurisdiction to hear the appeal on the second half of tax for want of protest, but did have jurisdiction to determine an overpayment on the first half of tax.

The Board, after computations had been made, decided on August 16, 1950 that the $4,922.92 assessment should be reduced to $2,149.46, and that petitioner was entitled to a refund of $1,386.73, "being the excess paid for the first half of said tax."

The "sole point" urged on appeal to the Court of Appeals was the Board's failure to find, on the evidence, the second half taxes were paid under protest.

The Court of Appeals affirmed the Board, without considering the issue whether or not the second half taxes were paid under protest (88 U.S. App. D.C. at 233-234):

> * * * Petitioner's appeal to the board showed on its face, and petitioner's motion to amend it admitted, that the appeal was taken before the second half of the tax was paid. The board so found. Petitioner does not attack this finding. The statutory requirement that one who appeals to the board from an assessed tax shall "first pay such tax" is clearly jurisdictional. Cf. District of Columbia v. McFall, 88 U.S. App. D.C. 217, 188 F.2d 991. The board's conclusion that it lacked jurisdiction in respect to the second half of the tax was therefore correct, irrespective of the factual premise on which it was based.
>
> The district filed no cross-petition for review and has not brought here the question whether the board had jurisdiction in respect to the first half of the tax.
> * * *

This conclusion apparently is based on the fact that petitioner had not paid the second half tax before filing the petition on March 14, 1947, even though such half had been paid March 17, 1947, well within the 90-day period for filing prescribed in D. C. Code sec. 47-2403 "after notice of such assessment" (January 17, 1947). Note that the Court

of Appeals reserved the question, whether the Board of Tax Appeals (now the Tax Court) has jurisdiction to consider the merits of the case as regards the first half of the tax.

The McFall case, 88 U.S. App. D.C. 217, 188 F.2d 991, referred to above, involved an excise tax on the issuance of original certificates of title to motor vehicles, now superseded by the sales tax. The excise tax, like the others referred to in this order, provided for appeal to the then Board of Tax Appeals by cross-reference to the prerequisites of Code section 47-2403, which then provided for appeal "provided such person shall first pay such tax * * * under protest in writing." (Emphasis added.)

Taxpayer was assessed $54.90, paid the tax on February 9, 1950, appealed to the Board of Tax Appeals on February 13, 1950, and protested to the Collector of Taxes by letter received February 21, 1950.

Held, as of the time when his petition was lodged with the Board, McFall's "payment of the tax was voluntary. It follows that the appeal to the Board would not lie." (88 U.S. App. D.C. at 219.)

This result was reached on the basis of the contract between the Federal requirements as to protest, which had been eliminated, and the requirements of D. C. law:

> * * * We do not see how it is possible to ignore the requirement that the person shall "first" pay under protest. If the statute had provided merely that the taxpayer might appeal within ninety days after notice of the assessment, provided that he should pay the tax under protest in writing, we might well consider that payment and protest might be one of the elements of the appeal itself and might occur any time within the ninety days, either before or after the actual filing of the appeal. But to reach that result upon the statute before us would require that we read the word "first" out of the statute. It seems clear enough that this statute was written against the background which we have outlined. It was written into District of Columbia law long after it had been written out of the Federal Internal Revenue Code. Although the provision appears to be harsh, we do not see how we can avoid giving it effect.

No doubt as a result of this case, the requirement of "protest in writing" was deleted by Act of July 10, 1952, 66 Stat. 543.

* * * * *

With deference, the reasoning of the Court of Appeals in the Industrial Bank case is not clear. Dubbing the "first pay such tax" clause as "clearly jurisdictional" does not tell us why taxpayer must pay a tax not yet due before filing with the Tax Court, nor does the McFall case clarify why the "protest in writing" clause is modified by the word "first", which word, in the statute, is directly related only to the requirement that taxpayer shall "pay such tax".

With equal deference, Greenstein will not be accepted as stare decisis of the case at bar. No rule of law, general or particular, was announced in that decision: the order of the Tax Court and the order of affirmance lay down no principles to be followed or drawn into question. Of course, the D. C. Tax Court must follow the decisions of the U. S. Court of Appeals for the District of Columbia, cf. Stacey Mfg. Co. v. Com'r., 237 F.2d 605 (CA 6). But we are surely not bound to follow reasoning rooted out of the transcript of trial proceedings which in no way are reflected in the orders of the courts. The Greenstein reasoning is faulty in any event: it is not a "privilege" to come to the D. C. Tax Court rather than to the D. C. common-law courts, nor is there "no reason why he [taxpayer] could not go into the District Court and attack this tax * * *." (supra, p. 8.) Code section 47-2413(c) provides the "reason why".

Thus the question remains -- on the facts disclosed by the pleadings, have petitioners paid the taxes complained of, within the sense of the statutory requirement, so as to be able to maintain their proceeding in the Tax Court?

Reasoning Summarized and Conclusion

Much of the applicable reasoning may be adopted from

Timoni v. U. S., CADC No. 21,896, decided June 13, 1969, interpreting statute of limitations provisions under the National Service Life Insurance Act of 1940 favorably to the beneficiary. There, the "striking consequence of adopting the government's position" and the "literal language of the statute" received close examination. (Slip opinion, pp. 11, 7.)

In the case at bar, the District's position is that (1) the accidental misnumbering of the cross-references in Code section 47-2405, of which the District has long been aware, (2) the ninety-day statute of limitations "after October 1 of the year" of the assessment (contained in the same section), (3) the prohibition against suing elsewhere, after "taxpayer has elected to file an appeal" with the Tax Court (section 47-2413(c)), and (4) a reading of the section 47-2403 clause "shall pay such tax" to mean "shall repay such tax, where payable in installments", close like four jaws of a steel trap to foreclose any review of petitioners' claims. In the language of Timoni, slip opinion p. 7, "This is so, says the government, because no other result is explicated by the statute, and the statute, it adds, should be strictly construed." The result is, of course, to be avoided if

possible: every taxpayer should have an independent review of his assessment, if he believes himself aggrieved thereby.

The simplest solution, paraphrasing Timoni, p. 12, is to recognize legislatively unarticulated exceptions to the statutory requirement that the tax must be paid before suit for refund is commenced -- the exceptions being limited to situations in which the tax is payable in installments, and the installments are paid when due. It is "hard to believe" that Congress, which "over the years has manifested a solicitous concern for judicial as well as administrative scrutiny" of action by the District's tax assessment officials -- a concern evident, inter alia, from the entire text of Chapter 24 of Title 47 of the D. C. Code -- would intend that taxpayers in the situation of the petitioners at bar be deprived of any right of review. Timoni, p. 13.

The labelling of the payment requirement as "jurisdictional", as we have seen, adds nothing to the respondent's position. The D. C. Tax Court and the other statutory courts in the District have the jurisdiction prescribed by statute, which need not be read literally, if an obvious purpose thereof -- here, provision for review -- would be frustrated by literal reading. See Harrison v. Northern Trust Co., 317 U.S. 476; Central Hanover Bank v. Com'r., 159 F.2d 167 (CA 2).

This interpretation avoids constitutional questions otherwise inhering in petitioners' situation. See Wickwire v. Reinecke, 275 U.S. 101, 105-106, citing the "undoubted power of Congress to provide any reasonable system for the collection of taxes and the recovery of them when illegal * * * if only the injunction against the taking of property without due process of law in the method of collection and protection of the taxpayer is satisfied" (citing cases); see also Old Colony Trust Co. v. Com'r., 279 U.S. 716, 727-728. Taxpayer, after appropriate notice should have a right to appear before a tribunal at some stage before the tax is irrevocably fixed. See Willmut Gas & Oil Co. v. Fly, 322 F.2d 301, 303 (CA5) and cases cited.

The net result is, that payment of the September installment of real estate tax is payment of the tax, within the meaning of the Code section 47-2403 clause "provided such person shall first pay such tax". The Tax Court has jurisdiction over the appeal, in the sense that the appeal may be lodged within the statutory time limit. However, the appeal will not be heard and determined until showing is made that the March installment of tax has also been paid, "together with penalties and interest due thereon [if any]".

Accordingly, the Motion to Dismiss is DENIED.

* * * *

FILED
AUGUST 1, 1969

DOCKET NO. 2072

STIPULATION

In this court's Ruling and Order denying motion to dismiss petition filed on June 19, 1969, the Court adopted jurisdiction over the appeal as having been lodged within the statutory time but ruled that the appeal would not be heard and determined "until showing is made that the March installment of tax has also been paid, 'together with penalties and interest due thereon' [if any]".

The Petitioners and Respondent hereby stipulate that the March installment of tax has been paid in full on the 26th day of March, 1969. Copies of the paid receipts are attached hereto and incorporated herein by reference as Petitioners' Exhibit #1.

* * * *

EXHIBIT NO. 1

Town Towers

LOT	SQUARE	SUFFIX	LOT	FIRST HALF TAX	SECOND HALF TAX
187	0212		0034		19208.72
				FIRST HALF PENALTY	PENALTY

178373 ✓

AFTER SEPT. 30, 1968, 1ST HALF TAX IS INCREASED BY 1% PER MONTH UNTIL PAID.

AFTER MARCH 31, 1969, 2ND HALF TAX WILL BE INCREASED BY 1% PER MONTH UNTIL PAID.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
FINANCE OFFICE—PROPERTY TAX DIVISION
TAXPAYERS RECORD
OF REAL ESTATE SECOND HALF TAX
FOR FISCAL YEAR 1969

ATTACH HERE

1969

ALLEN BERENTER ETAL
CARE TOWNE HOUSE ASSOC
1420 N STREET
WASHINGTON DC

PROPERTY ADDRESS
N ST NW

01 82200 024849

IF STAMPED RECEIPT IS DESIRED, BOTH COPIES MUST BE RETURNED WITH PAYMENT

024 849

DO NOT FOLD, STAPLE, OR MUTILATE

FP-177 (REV. 8-68)

Certified Copy of Tax receipt
in our files
B. J. Board
J. S. Yarbrough
Treasurer

FACTS ABOUT THE REAL ESTATE TAX

The real estate tax is the largest single source of revenue for financing the operations of the District of Columbia Government, amounting to 32 percent of all general fund tax collections. The real estate tax rate is set annually by the city council based on the financial needs of your government.

Real estate assessments are based upon the current market value of property. By assessing each property uniformly in accordance with its value, the real estate tax burden is distributed fairly and equitably among all property owners.

The assessed value of your real estate multiplied by the tax rate determines the amount of your real estate tax. You can calculate your tax using the following formula:

TOTAL ASSESSED VALUE ÷ $100 x CURRENT TAX RATE = REAL ESTATE TAX

Your total assessed value and the current tax rate per $100 of assessed value are shown on the front of this bill.

For further information, contact the Property Tax Division, Room 2000, Municipal Center, 300 Indiana Avenue, N. W. Telephone No. 629-3135.

PAID 3-28-69 205 [illegible] 1020072

Certified copy of back of receipt for lot 0834 sq 0212 in our files
B J [illegible]
[illegible]
Treasurer

Insubstant

	SQUARE	SUFFIX	LOT	FIRST HALF TAX	SECOND HALF TAX
187	0212		0030		517.17
				FIRST HALF PENALTY	PENALTY

161227

AFTER SEPT 30, 1968, 1ST HALF TAX IS INCREASED BY 1% PER MONTH UNTIL PAID.

AFTER MARCH 31, 1969, 2ND HALF TAX WILL BE INCREASED BY 1% PER MONTH UNTIL PAID.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
FINANCE OFFICE—PROPERTY TAX DIVISION
TAXPAYERS RECORD
OF REAL ESTATE SECOND HALF TAX
FOR FISCAL YEAR 1969

DETACH HERE

1969
M MAX LEDERER ETAL
1411 K ST NW
WASHINGTON DC 20005

PROPERTY ADDRESS
N ST NW

01879500 024826

IF STAMPED RECEIPT IS DESIRED, BOTH COPIES MUST BE RETURNED WITH PAYMENT
DO NOT FOLD, STAPLE, OR MUTILATE

024 626
FP-177 (REV. 6-68)

	SQUARE	SUFFIX	LOT	FIRST HALF TAX	SECOND HALF TAX
187	0212		0152		454.74
				FIRST HALF PENALTY	PENALTY

161227

AFTER SEPT 30, 1968, 1ST HALF TAX IS INCREASED BY 1% PER MONTH UNTIL PAID.

AFTER MARCH 31, 1969, 2ND HALF TAX WILL BE INCREASED BY 1% PER MONTH UNTIL PAID.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
FINANCE OFFICE—PROPERTY TAX DIVISION
TAXPAYERS RECORD
OF REAL ESTATE SECOND HALF TAX
FOR FISCAL YEAR 1969

DETACH HERE

1969
M MAX LEDERER ETAL
1411 K ST NW
WASHINGTON DC 20005

PROPERTY ADDRESS
N ST NW

01879300 024324

IF STAMPED RECEIPT IS DESIRED, BOTH COPIES MUST BE RETURNED WITH PAYMENT
DO NOT FOLD, STAPLE, OR MUTILATE

024 624
FP-177 (REV. 6-68)

	SQUARE	SUFFIX	LOT	FIRST HALF TAX	SECOND HALF TAX
187	0212		0031		457.33
				FIRST HALF PENALTY	PENALTY

161227

AFTER SEPT 30, 1968, 1ST HALF TAX IS INCREASED BY 1% PER MONTH UNTIL PAID.

AFTER MARCH 31, 1969, 2ND HALF TAX WILL BE INCREASED BY 1% PER MONTH UNTIL PAID.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
FINANCE OFFICE—PROPERTY TAX DIVISION
TAXPAYERS RECORD
OF REAL ESTATE SECOND HALF TAX
FOR FISCAL YEAR 1969

DETACH HERE

1969
M MAX LEDERER ETAL
1411 K ST NW
WASHINGTON DC 20005

PROPERTY ADDRESS
N ST NW

01879400 024325

IF STAMPED RECEIPT IS DESIRED, BOTH COPIES MUST BE RETURNED WITH PAYMENT
DO NOT FOLD, STAPLE, OR MUTILATE

024 625
FP-177 (REV. 6-68)

	SQUARE	SUFFIX	LOT	FIRST HALF TAX	SECOND HALF TAX
[illegible]	0212		[illegible]		[illegible]
				FIRST HALF PENALTY	PENALTY

161227 ✓

AFTER SEPT 30, 1968, 1ST HALF TAX IS INCREASED BY 1% PER MONTH UNTIL PAID.

AFTER MARCH 31, 1969, 2ND HALF TAX WILL BE INCREASED BY 1% PER MONTH UNTIL PAID.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
FINANCE OFFICE—PROPERTY TAX DIVISION
TAXPAYERS RECORD
OF REAL ESTATE SECOND HALF TAX
FOR FISCAL YEAR 1969

DETACH HERE

M MAX LEDERER ETAL
1411 K ST NW
[illegible]

PROPERTY ADDRESS
1443 N ST NW

IF STAMPED RECEIPT IS DESIRED, BOTH COPIES MUST BE RETURNED WITH PAYMENT
DO NOT FOLD, STAPLE, OR MUTILATE

024 623
FP-177 (REV. 6-68)

"Typed copies of receipts" in our files. Found in District Treasurer

Ex 1 (1-2)

PAID 3-26-69

FACTS ABOUT THE REAL ESTATE TAX

The real estate tax is the largest single source of revenue for financing the operations of the District of Columbia Government, amounting to 32 percent of all general fund tax collections. The real estate tax rate is set annually by the city council based on the financial needs of your government.

Real estate assessments are based upon the current market value of property. By assessing each property uniformly in accordance with its value, the real estate tax burden is distributed fairly and equitably among all property owners.

The assessed value of your real estate multiplied by the tax rate determines the amount of your real estate tax. You can calculate your tax using the following formula:

TOTAL ASSESSED VALUE ÷ $100 x CURRENT TAX RATE = REAL ESTATE TAX

Your total assessed value and the current tax rate per $100 of assessed value are shown on the front of this bill.

For further information, contact the Property Tax Division, Room 2000, Municipal Center, 300 Indiana Avenue, N. W. Telephone No. 629-3135.

PAID 3-26-69 D.C. TREASURER

FACTS ABOUT THE REAL ESTATE TAX

The real estate tax is the largest single source of revenue for financing the operations of the District of Columbia Government, amounting to 32 percent of all general fund tax collections. The real estate tax rate is set annually by the city council based on the financial needs of your government.

Real estate assessments are based upon the current market value of property. By assessing each property uniformly in accordance with its value, the real estate tax burden is distributed fairly and equitably among all property owners.

The assessed value of your real estate multiplied by the tax rate determines the amount of your real estate tax. You can calculate your tax using the following formula:

TOTAL ASSESSED VALUE ÷ $100 x CURRENT TAX RATE = REAL ESTATE TAX

Your total assessed value and the current tax rate per $100 of assessed value are shown on the front of this bill.

For further information, contact the Property Tax Division, Room 2000, Municipal Center, 300 Indiana Avenue, N. W. Telephone No. 629-3135.

PAID 3-26-69 D.C. TREASURER

FACTS ABOUT THE REAL ESTATE TAX

The real estate tax is the largest single source of revenue for financing the operations of the District of Columbia Government, amounting to 32 percent of all general fund tax collections. The real estate tax rate is set annually by the city council based on the financial needs of your government.

Real estate assessments are based upon the current market value of property. By assessing each property uniformly in accordance with its value, the real estate tax burden is distributed fairly and equitably among all property owners.

The assessed value of your real estate multiplied by the tax rate determines the amount of your real estate tax. You can calculate your tax using the following formula:

TOTAL ASSESSED VALUE ÷ $100 x CURRENT TAX RATE = REAL ESTATE TAX

Your total assessed value and the current tax rate per $100 of assessed value are shown on the front of this bill.

For further information, contact the Property Tax Division, Room 2000, Municipal Center, 300 Indiana Avenue, N. W. Telephone No. 629-3135.

PAID 3-26-69 D.C. TREASURER

FACTS ABOUT THE REAL ESTATE TAX

The real estate tax is the largest single source of revenue for financing the operations of the District of Columbia Government, amounting to 32 percent of all general fund tax collections. The real estate tax rate is set annually by the city council based on the financial needs of your government.

Real estate assessments are based upon the current market value of property. By assessing each property uniformly in accordance with its value, the real estate tax burden is distributed fairly and equitably among all property owners.

The assessed value of your real estate multiplied by the tax rate determines the amount of your real estate tax. You can calculate your tax using the following formula:

TOTAL ASSESSED VALUE ÷ $100 x CURRENT TAX RATE = REAL ESTATE TAX

Your total assessed value and the current tax rate per $100 of assessed value are shown on the front of this bill.

For further information, contact the Property Tax Division, Room 2000, Municipal Center, 300 Indiana Avenue, N. W. Telephone No. 629-3135.

SQUARE	SUFFIX	LOT	FIRST HALF TAX	SECOND HALF TAX
1				

FIRST HALF PENALTY | PENALTY | INT

GOVERNMENT OF THE DISTRICT OF COLUMBIA
FINANCE OFFICE—PROPERTY TAX DIVISION
TAXPAYERS RECORD
OF REAL ESTATE SECOND HALF TAX
FOR FISCAL YEAR 1969

DETACH HERE

1411 K ST NW

PROPERTY ADDRESS
K ST NW

IF STAMPED RECEIPT IS DESIRED, BOTH COPIES MUST BE RETURNED WITH PAYMENT
DO NOT FOLD, STAPLE, OR MUTILATE
024 838

SQUARE	SUFFIX	LOT	FIRST HALF TAX	SECOND HALF TAX
1				

FIRST HALF PENALTY | PENALTY | INT

GOVERNMENT OF THE DISTRICT OF COLUMBIA
FINANCE OFFICE—PROPERTY TAX DIVISION
TAXPAYERS RECORD
OF REAL ESTATE SECOND HALF TAX
FOR FISCAL YEAR 1969

DETACH HERE

1411 K ST NW

PROPERTY ADDRESS
K ST NW

IF STAMPED RECEIPT IS DESIRED, BOTH COPIES MUST BE RETURNED WITH PAYMENT
DO NOT FOLD, STAPLE, OR MUTILATE
024 837

SQUARE	SUFFIX	LOT	FIRST HALF TAX	SECOND HALF TAX
1				

FIRST HALF PENALTY | PENALTY | INT

GOVERNMENT OF THE DISTRICT OF COLUMBIA
FINANCE OFFICE—PROPERTY TAX DIVISION
TAXPAYERS RECORD
OF REAL ESTATE SECOND HALF TAX
FOR FISCAL YEAR 1969

DETACH HERE

1411 K ST NW

PROPERTY ADDRESS
K ST NW

IF STAMPED RECEIPT IS DESIRED, BOTH COPIES MUST BE RETURNED WITH PAYMENT
DO NOT FOLD, STAPLE, OR MUTILATE
024 827

SQUARE	SUFFIX	LOT	FIRST HALF TAX	SECOND HALF TAX
1				

FIRST HALF PENALTY | PENALTY | INT

GOVERNMENT OF THE DISTRICT OF COLUMBIA
FINANCE OFFICE—PROPERTY TAX DIVISION
TAXPAYERS RECORD
OF REAL ESTATE SECOND HALF TAX
FOR FISCAL YEAR 1969

DETACH HERE

PROPERTY ADDRESS
K ST

IF STAMPED RECEIPT IS DESIRED, BOTH COPIES MUST BE RETURNED WITH PAYMENT
DO NOT FOLD, STAPLE, OR MUTILATE
024 836

FACTS ABOUT THE REAL ESTATE TAX

The real estate tax is the largest single source of revenue for financing the operations of the District of Columbia Government, amounting to 32 percent of all general fund tax collections. The real estate tax rate is set annually by the city council based on the financial needs of your government.

Real estate assessments are based upon the current market value of property. By assessing each property uniformly in accordance with its value, the real estate tax burden is distributed fairly and equitably among all property owners.

The assessed value of your real estate multiplied by the tax rate determines the amount of your real estate tax. You can calculate your tax using the following formula:

TOTAL ASSESSED VALUE ÷ $100 x CURRENT TAX RATE = REAL ESTATE TAX

Your total assessed value and the current tax rate applied to assessed value are shown on the front of the bill.

For further information, contact the Property Tax Division, Room 2000, Municipal Center, 300 Indiana Avenue, N. W. Telephone No. 629-3135.

FACTS ABOUT THE REAL ESTATE TAX

The real estate tax is the largest single source of revenue for financing the operations of the District of Columbia Government, amounting to 32 percent of all general fund tax collections. The real estate tax rate is set annually by the city council based on the financial needs of your government.

Real estate assessments are based upon the current market value of property. By assessing each property uniformly in accordance with its value, the real estate tax burden is distributed fairly and equitably among all property owners.

The assessed value of your real estate multiplied by the tax rate determines the amount of your real estate tax. You can calculate your tax using the following formula:

TOTAL ASSESSED VALUE ÷ $100 x CURRENT TAX RATE = REAL ESTATE TAX

Your total assessed value and the current tax rate applied to assessed value are shown on the front of the bill.

For further information, contact the Property Tax Division, Room 2000, Municipal Center, 300 Indiana Avenue, N. W. Telephone No. 629-3135.

FACTS ABOUT THE REAL ESTATE TAX

The real estate tax is the largest single source of revenue for financing the operations of the District of Columbia Government, amounting to 32 percent of all general fund tax collections. The real estate tax rate is set annually by the city council based on the financial needs of your government.

Real estate assessments are based upon the current market value of property. By assessing each property uniformly in accordance with its value, the real estate tax burden is distributed fairly and equitably among all property owners.

The assessed value of your real estate multiplied by the tax rate determines the amount of your real estate tax. You can calculate your tax using the following formula:

TOTAL ASSESSED VALUE ÷ $100 x CURRENT TAX RATE = REAL ESTATE TAX

Your total assessed value and the current tax rate applied to assessed value are shown on the front of the bill.

For further information, contact the Property Tax Division, Room 2000, Municipal Center, 300 Indiana Avenue, N. W. Telephone No. 629-3135.

24.1 (No. 6)

FILED
OCTOBER 10, 1969

DOCKET NO. 2072

MOTION FOR LEAVE TO AMEND PETITION

Comes now the Petitioners in the above cause, by and through their attorneys, Jules Fink and Harry S. Wender, and moves as follows:

1. That the Petition filed to protest a real estate tax assessment for the fiscal year 1969 made pursuant to Rule 47-708 of the District of Columbia Code be amended to include all subsequent years thereafter, more particularly fiscal year 1970 and those following and as grounds therefor states as follows:

(A) That the Petitioners complied with Title 47-2405 by first filing their complaint with the Board of Equalization and Review as to the fiscal year 1969 assessment.

(B) The Petitioners have not filed a protest concerning the fiscal year 1970 assessment since the assessment was identical to the 1969 assessment which was under protest herein.

(C) The Petitioners take the position that an adjustment in the assessment by this Court would effectively

entitle them to adjustments for all years subsequent thereto which were paid upon the same erroneous assessment.

(D) The District of Columbia Government has advised that they do not consider the protest to be continuing in nature and aver that there must be a refiling annually.

(E) For fiscal year 1970, Petitioners have again paid one-half of the tax due in accordance with the previous ruling of this Court in this case. They, therefore, request that as to fiscal year 1970, that the amendment of this Petition be deemed to be lodged until such time as they have paid the second half of taxes due, at which time the Court will consider such relief as may be appropriate for fiscal year 1970.

(F) The amounts in controversy would be identical to those set forth in the initial petition.

(G) The Petitioners' position with regard to this issue is the only one which will avoid multiplicity of actions.

* * * *

The following is supplementary material printed for the benefit of the Court at the request of Jules Fink, Esq., counsel for Allen Berenter, et al.

DISTRICT OF COLUMBIA TAX COURT

CAPITOL PARK PROPERTIES ASSOCIATES et al.,	)	FILED FEBRUARY 26, 1970
Petitioners,	)	DOCKET NOS. 2099, 2100 2101, 2102 and 2103
v.	)	
DISTRICT OF COLUMBIA,	)	
Respondent.	)	

ORDER DENYING MOTIONS TO DISMISS

These petitions involve the valuations and consequent real estate taxes on eight of the new structures in southwest Washington. In each case, it is alleged that "Petitioner paid one-half of the tax on September 30, 1969, and will remit the remainder on or before March 31, 1970 when it shall become due." The taxes sought to be reduced aggregate $532,086.58. Respondent's motion in each case is "on the ground that this Court lacks jurisdiction to hear and determine this case" because the entire amount of the taxes had not been paid in full before the petitions were filed on December 29, 1969.

The issue thus presented is thus identical with that decided in Allen Berenter, et al. v. District of Columbia, Order Denying Motion to Dismiss issued June 19, 1969, 97

W.L.R. 1197, CCH D.C. State Tax Reporter par. 200-136; Decision for Petitioners issued January 13, 1970, 98 W.L.R. 165; Petition for Review to the U. S. Court of Appeals filed by Respondent January 26, 1970. See also, May Department Stores Company, Docket No. 2106, Order Denying Motion to Dismiss issued February 20, 1970.

The memorandum in opposition to the motion to dismiss raises several points which deserve notice and which were not fully covered in the order of June 19, 1969, supra.

First, under the Act of July 3, 1926 as amended, D. C. Code sec. 47-1209, the real estate taxes in Berenter and in the cases at bar are "payable semiannually in equal installments in the months of September and March", and are thus, by statute, not due in full at the date, December 30 of the given fiscal year, by which the aggrieved taxpayer must appeal from the "assessment, equalization, or valuation" of which he complains. See Code sec. 47-2405, providing for appeal "within ninety days after October 1 of the year in which such assessment, equalization, or valuation is made." The appeal, when thus lodged in the D. C. Tax Court, puts in issue the assessment, equalization, or valuation on which the given taxes are levied and are to be paid one-half in

September and one-half in March. Code sec. 47-2403, incorporated by reference in said sec. 47-2405, requiring that a petitioner to the D. C. Tax Court "first pay such tax" is properly constructed, giving effect to sec. 47-1209, to mean "first pay" whatever tax is due at the time the petition is filed. Therefore, the right to lodge an appeal from the assessment does not, under the statutory scheme, depend upon the prepayment of the last installment of real estate taxes not due at the time the appeal must be taken under the 90-day statute of limitations.

Second, the taxes specifically referred to in sec. 47-2403 are "personal debts" of those liable therefor, cf. e.g. sec. 47-1586h, whereas the real estate tax lies against the property itself, and not the person. Tumulty v. D. C., 69 App. D.C. 390, 102 F.2d 254, 259. The duty and time to pay real estate taxes, and the security therefor, are fixed and determined. The District's budget considerations, or apprehensions concerning ultimate non-payment of taxes not paid before suit commences, have no part in considering the policy and intent of the D. C. real estate tax laws.

Third, a requirement that real estate taxes be prepaid as a condition to Tax Court review would, in the cases

at bar, preclude petitioners' use of $266,043.29 for a period of at least three months. There is no indication of Congressional intent to so condition independent review of action by the tax authorities.

WHEREFORE, the motions to dismiss in each of the above dockets are hereby denied.

* * * *

FILED
OCTOBER 14, 1969

DOCKET NO. 2072

ANSWER OF RESPONDENT
DISTRICT OF COLUMBIA

Answering the allegations contained in the petition, paragraph by paragraph, respondent states as follows:

1. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the petition.

2-3. Admits the allegations contained in paragraphs 2 and 3 of the petition.

4. Denies the allegations contained in paragraph 4 of the petition.

5. Admits the first sentence of subparagraph (c) of

paragraph 5, but denies the remaining allegations contained in paragraph 5 of the petition.

6. Denies the allegations contained in subparagraphs (a), (b), and (c) of paragraph 6 of the petition. Admits appraisals were submitted to the Board of Equalization and Review. Admits testimony by the petitioners' appraiser was heard by the Board and further admits that copies of written appraisals are attached to the petition filed with the Court. Denies the remaining allegations contained in subparagraph (d) of paragraph 6 of the petition.

7. Respondent states petitioners are not entitled to the relief sought in paragraph 7 of the petition.

8. Respondent denies generally and specifically each and every allegation contained in the petition not heretofore expressly admitted, qualified or denied.

* * * *

FILED
OCTOBER 14, 1969

DOCKET NO. 2072

MEMORANDUM IN OPPOSITION TO PETITIONERS' MOTION FOR LEAVE TO AMEND PETITION

Petitioners have filed a motion for leave to amend their petition dated December 30, 1968 relating to a real

property tax assessment for the fiscal year 1969 so that the petition will also apply to the District's real property tax assessment for the fiscal year 1970 as well.

On December 30, 1968 petitioners filed a petition asking for certain reductions in their real property tax assessments for the fiscal year 1969 on property which is identified by lot and square number in said petition. The District had not filed an answer to that petition at the time petitioners filed their motion. Thereafter, on October 10, 1969, petitioners filed a Motion For Leave To Amend Petition.

Rule No. 11 of the Rules Of Procedure Before The District Of Columbia Tax Court provides a ground for denying petitioners' motion. Rule 11(a) provides as follows:

> "(a) General.-A motion for leave to amend a pleading shall state reasons for granting it and shall be accompanied by the proposed amendment."

Petitioners have not submitted with their motion any specific proposed amendments to their petition. They have simply asked for general relief and have not, therefore, complied with the rules of this Court which relate to amended and supplemental pleadings.

Section 47-702, D.C. Code, 1967, provides as follows:

> "Assessments of real estate in the District of Columbia for purposes of taxation shall be

> made annually in the same manner and subject to the same limitations as heretofore provided by law for making biennial assessments of real estate in said District." (Emphasis supplied.)

Section 47-702, supra, makes it abundantly clear that assessments for real estate tax purposes in the District of Columbia are made annually and must be so made for each fiscal year. Paragraph (C) of petitioners' motion states as follows:

> "(C) The Petitioners take the position that an adjustment in the assessment by this Court would effectively entitle them to adjustments for all years subsequent thereto which were paid upon the same erroneous assessment."

Petitioners' own statement is fatally defective since it assumes despite section 47-702 there is no difference in assessments for different fiscal years. Section 47-709, which deals with valuations of real property also calls for annual valuation, not a continuing valuation. Section 47-709 states in pertinent part:

> "* * * The valuation of said real property made and equalized as aforesaid shall be approved by the Commissioners not later than July 1, annually, and when approved by the Commissioners shall constitute the basis of taxation for the next succeeding year and until another valuation is made according to law, * * *." (Emphasis supplied.)

Petitioners' request to amend this petition is defective in another area in that it quite candidly states in paragraph (B) of the motion as follows:

> "(B) The Petitioners have not filed a protest concerning the fiscal year 1970 assessment since the assessment was identical to the 1969 assessment which was under protest herein."

Section 47-2405 requires that prior to any appeal from an assessment of real property tax a complaint shall have been first made to the Board of Equalization and Review. Petitioners by their own admission have not done so.

For the foregoing reasons petitioners' Motion For Leave To Amend Petition should be denied.

* * * * .

FILED
OCTOBER 15, 1969

DOCKET NO. 2072

ORDER DEFERRING RULING ON
MOTION FOR LEAVE TO AMEND PETITION

On October 10, 1969, petitioners moved that the petition herein be amended so as to constitute an appeal from the assessment of the real estate in question for the fiscal year 1970 and subsequent years as well as fiscal year 1969,

specifically complained of in the petition. Respondent's opposition to the motion was filed herein on October 14, 1969.

The hearing on the merits herein is scheduled for October 20, 1969, accordingly

IT IS ORDERED that argument on the motion and opposition to the motion will be heard at the opening of the hearing on the merits herein and the ruling on such motion will be deferred until after such hearing.

* * * *

[1] Monday, October 20, 1969

Pursuant to notice, the above-entitled matter came on for hearing at 10:15 a.m.

BEFORE:

HONORABLE ROBERT M. WESTON

* * * *

[2] THE COURT: We have before us a case of Berenter, B-e-r-e-n-t-e-r versus the District of Columbia relative to the assessment of real estate taxes on several parcels of property on N Street Northwest.

The first order of business as I see it unless there be objection, is the petitioner's motion for leave to amend

the petition filed in this court, October 10, 1969, in which the petitioners seek to have the assessment made for the fiscal year 1970 which is apparently in the same amount as the assessment for the fiscal year 1969 included in this petition. The motion also refers to all subsequent years, but I think that we have particularly in mind the fiscal year 1970 which is, of course, the closest at hand to the fiscal year 1969.

Will the attorney for petitioners identify himself and address --

OPENING STATEMENT OF JULES FINK, ESQ.

MR. FINK: Jules Fink, appearing for petitioner, Your Honor. First let me state that we have three problems here.

Number one, we have not filed before the Board of Equalization and Review for the fiscal year, 1970 situation.

We contend simply that the relief afforded by this court, if any, would permeate the entire basis from year to year that it would not be necessary for us to go back con-
[3] tinually. Thus, for example, if Your Honor were to find that the assessment that was made by the District was in error that this erroneous assessment would be carried forward,

that is the correct assessment would be carried forward from year to year, and that the only basis upon which the District could then change it would be by making a new assessment of the property as provided by law.

We say that our position is the only one which prevents a multiplicity of law suits because the District's position is that while a case is pending before this court, which would give relief on valuation. And the evidence or the record is clear that there was no new appraisal.

The argument by the District simply is that by, merely by, affirming a given amount they have in effect stated that that is the appraisal for the subsequent year, but I think this court has to look through the facade to see what actually happens. No new appraisal was made, and therefore, nothing has changed in essence from the situation which was before this court in so far as a continuum of change in the assessment basis is concerned.

We, therefore, of course, had to -- The District says we were candid with the court. We can't be anything but candid and tell the court that we have not gone before the Board of Equalization and Review. Thus, if we were to file a petition which we normally could do had we gone before

[4] the Board between October and December, we would be in a position where the same argument would be made, that not having raised our objection before the Board of Equalization and Review, we are now precluded from coming before this court because the argument would continue that a prerequisite for jurisdiction in this court would be our appearance before the Board of Equalization and Review for the fiscal 1970 assessment.

So our position is simply that as a matter of law this court when it rules on that assessment for the fiscal '69, and I might respectfully point out to the court that in our original petition, Paragraph 4, A and B, we have stated that we claim excess taxes charged of so many dollars per year. In other words, this is not taking or should not have taken, the District particularly by surprise concerning our contention that we are entitled to the same relief straight through.

I might also say that -- and I have filed a reply to the opposition which may not be reflected in Your Honor's files since I filed it on the 17th and it may have just been received into court this morning -- but I merely said to the court that we are entitled to it as a matter of law. The

reason that we brought it up by way of motion was because we were appraised very kindly by Mr. Wixon of the District's position. And I always believe in getting these things out into the open early and discussing them rather than letting them fester and create a problem at the end of the case. I [5] also pointed out that there has been no affirmative action by the District to change the assessment. They have merely left it as it was, and therefore, we feel that on this basis we are entitled, if the court finds relief at all in this case --that we are entitled to have an order which would comple the District to continue that same relief to any subsequent year, 1970 or otherwise, that might be involved. For example, supposing that Your Honor was to rule in our favor, we would not appeal. And the case would pend for another, let us say two years, I won't say it will be that long, but it could be, during that period of time what is our relief? Do we go back continually over and over again, and then come back to the court of Appeals and say we want to amend our petition before this court to include this year, and this year, and this year.

And I say that this is not what is required of litigants under the law, and as a matter of law we are entitled to the relief.

THE COURT: I would put the matter this way: that in substance it is your contention that since there has been no actual physical reappraisal and determination of, let us say, the exact same dollar figure for the fiscal year 1970, that one looks through the formal situation that is of re-appraisal each year theoretically might exist when actual situation -- which the District has simply reassessed actually the same amount as the prior year with no intervening change [6] in circumstances of any substantial nature. Why you contend that until such time as there is another appraisal of which you are made familiar, why the subsequent years until a real new appraisal is covered by the action on fiscal 1969?

MR. FINK: That is correct, Your Honor.

THE COURT: Mr. McCally.

OPENING STATEMENT OF ROBERT E. MC CALLY, ESQ.

MR. MC CALLY: Your Honor, we filed the written opposition really based on three points.

First was a procedure on Rule 11-A of this court, it provides that a motion for leave to amend the pleadings shall state reasons for granting it, and should be accompanied by the proposed amendment.

Now, Mr. Fink's motion gave the reasons, but I don't see attached to it any proposed amendment so I think it is procedurally defective.

THE COURT: No, I am not going to accept that because --

MR. MC CALLY: Well, that is simply argument, Your Honor.

THE COURT: OK.

MR. MC CALLY: Now, number two, those sections of the Code, particularly 47,702, which deals with assessments, speaks of assessments on an annual basis, and each year an assessment is made. And I assume by this time, September, Mr. Fink's client has received his 1970 real property tax
[7] bill. That particular section which I refer to states that assessments of real estate in the District of Columbia for purposes of taxation shall be made annually in the same manner and subsequent to the same limitations as heretofore provided by law and et cetera.

Now, Mr. Fink has spoken of appraisals. I don't know whether he is confusing that with assessment or not. As the court well knows, the District uses the mass appraisal system, and if you want to call it that conditional appraisal

has been made which is an assessment. Now, it may well be for this year, and I don't know what evaluation was appraised to that property, but a new assessment has been made. And the bills are normally sent out in September as I stated before, his client should have that so a new assessment has been made.

Now, once the assessment has been made the Code, Section 47--709 which deal with evaluation of real property states that the evaluation of said real property made and equalized as aforesaid shall be approved by the Commissioners not later than July 1, annually, and when approved by the Commissioners shall constitute the basis for taxation for the next succeeding year, and until another evaluation is made according to law which is done every year.

Now, once that assessment has been made, Section 47-2405 comes into play which provides that a complaint shall first be made before the Board of Equalization and Review as [8] Mr. Fink has quite candidly stated they did not do so. Of course, our position is that each year there is a new assessment and in order to protect yourself you must file a petition to this court, a prerequisite to file petition is that a complaint must be made to the Board of Equalization and Review.

So for these reasons we feel that the motion for leave to amend should be denied.

THE COURT: Now let me ask you, hasn't this ever come up before?

MR. MC CALLY: Your Honor, we have a series of cases here, the Shoreham Hotel particularly. In those cases counsel for those petitioners each year in order to protect themselves did file new petitions and that is the way the matter is handled, and of course, we take the position that is the only way it can be handled.

MR. FINK: May it please the court, just two brief observations. Number one, it appears that this case is destined to have some ramifications in many areas of procedure. This just happens to be one of them. The District admits that they have a mass appraisal system. I think Your Honor knows what they mean by that; namely, this is it. This is what the appraisal is going to be. We have already done it once before, we are not going to go back and redo it.

Now, that admission certainly it seems to me, and it is a fact that bolsters our position with respect to what they [9] actually did, and it is a matter of substance over form. I also urge the court, and I recognize that this is not an argument in this sense that -- but I think it is relevant

here -- that it is a matter which can and probably will from what I understand about the District's position here today be decided in the Court of Appeals, and I think the court should let the Court of Appeals decide it because we will in all probability be there. And I say that our argument represents a rational and practical solution to a problem which otherwise would create an injustice at the very least and would be contrary to what is intended by having litigation pending on these matters at the time they are going on.

It just is ridiculous in my mind to have a multiplicity of suits and a multiplicity of pleadings on the same issue when no different situation is in fact in existence.

THE COURT: Now, Mr. Fink, it occurs to me that this is going to require at least a minimum of factual evidence, don't you know, as to what occurs in regard to the assessment rather than appraisal or you can say appraisal and assessment of D. C. real estate. In other words, if as you state substance or control over form in regard to a subsequent year, why then there ought to be a minimum of least of fact in the record showing what the District procedure is.

MR. FINK: I will present that evidence during the course of my case, Your Honor, with our own expert witness,

[10] and I intend to do so.

THE COURT: Yes. Now you see in the abstract, of course, a decision with regard to fiscal year 1969 doesn't necessarily control like fiscal '70 any subsequent year, let us say five years from now because property values are, of course, changing all the time.

So hopefully, we will have a record that contains some fact on which this motion, of course, can be determined. Is there anything further, Mr. McCally?

MR. MC CALLY: No, Your Honor. I might just say one thing. Of course, we have today real property is on the rising market as we all know. Now, if you take the reverse of this situation, I don't think the taxpayers would want to be bound by court decision for one year if real property suddenly dropped by saying well here is a court case. Now just because we assessed last, next year you still have to pay the old rate. I don't think that is the way it was intended, and while you can have what Mr. Fink calls a multiplicity of suits, the Statute requires it. What he in effect is asking for in my own opinion is practically injunctive relef. And as we all know, the courts can not enjoin the collection of taxes.

THE COURT: I am perfectly aware of what the Statute says here, and I also don't particularly take to the idea of filing papers just to preserve one's position if one doesn't [11] have to you know. In other words, if it is merely a formality why my inclination is to say waive the formality wherever possible.

MR. MC CALLY: Your Honor, I could agree with you accept for one thing what I think you really have here is an exhaustion of administrative remedies. You have an administrative process to afford relief, to prevent people from getting into court is well aware, in many instances the Board of Equalization and Review does lower taxes, thus obviating the necessity.

Now, Mr. Fink can't say with any certainty any more than I can had he gone before the Board of Equalization and Review they wouldn't have given him some relief.

THE COURT: For 1970?

MR. MC CALLY: That is true. That is correct.

THE COURT: Now, incidentally, if by any chance there is more than a purely routine filing of the papers for 1970 under these circumstances, I hope you would bring that out as a fact, you see. In other words if the Board actually

looks at the refiling of petition similar to the one filed in 1969, when it comes into the year 1970, why I would appreciate knowing about it.

MR. MC CALLY: Your Honor, there would be a complete hearing and with the opportunity for presentation of appraisals and that type of thing, and it probably would be looked at [12] again.

I don't think any of these hearings down there are routine. Those who seek them from what little experience I have come pretty well armed to prove their point, and of course, we try to give them that consideration which we think they are entitled to. Of course we do have disagreements. As Your Honor well knows we have had this problem of disturbances here several years ago which has affected real property in many areas. And certainly in those areas, I do know, adjustments have been made to take into consideration the physical factors that have affected the neighborhoods. But I certainly believe that had a protest been made, they would have given a full hearing and would not have been a routine hearing.

THE COURT: Is there anything further on this motion?

MR. MC CALLY: No, Your Honor.

THE COURT: Well, I will reserve decision on the motion and cover it in the decision on the merits.

OPENING STATEMENT OF HENRY E. WIXON, ESQ.

MR. WIXON: Your Honor, if I may, I would like to address myself to the earlier motion that the District of Columbia filed. That is to say one that sought a dismissal in this petition on the ground that the amount of tax was not paid in full prior to the filing of the petition, by Mr. Berenter and by others in this case.

I certainly am not going to take the time of this
[13] court to reiterate what was set forth in the motion on the record, but one comment I think I ought to address myself to, one comment in Your Honor's memorandum in this matter relating to what took place in Greenstein versus the District of Columbia. Since I was counsel of that case, I can assure Your Honor, Mr. Fink has been supplied with the necessary materials in that case. The briefs were filed and the case was fully argued before the United States Court of Appeals.

THE COURT: Well, now, whatever I said I took out of it.

MR. WIXON: I certainly want to call that to Your Honor's attention because --

THE COURT: Well I see --

MR. WIXON: If Your Honor will pardon my interruption, but on Page 9, reading from Your Honor's memorandum, oh, approximately one-third down the page, it is stated, and I am quoting, "What the authority of the Greenstein case rests on the painstaking research of the transcript and record there made. There are no findings, no conclusions, accept the ultimate conclusion, no opinion or decision explaining the action taken. Apparently, no briefs were filed in the Court of Appeals. The points demanded on oral argument are not known. The matter is not conclusively set." Of course I shall not read on. I simply wanted to bring to Your Honor's attention the fact that case was fully briefed [14] and argued in the United States Court of Appeals.

Now, it is true that no opinion was written. We just have a memorandum confirming the determination of the Tax Court.

THE COURT: I am sorry for that mistake.

MR. WIXON: Not necessarily a mistake sir, I wanted to alert you to the fact that there were briefs.

THE COURT: I am sure this record will be complete. The reason for that mistake was such -- is such -- that the only words that we have from the United States Court of

Appeals is, "This case came on to be heard on the record from the District of Columbia Tax Court, and was argued by counsel."

In other words, that those words indicated to me that it was on the record plus oral argument, and I didn't realize it also had been written.

MR. WIXON: That is of no particular materiality, but I think that it can be stated that the Court of Appeals did consider the matter at least in so far as these cases are ordinarily heard by the Court of Appeals fully. Again as I say I would like to renew our motion. The predicates for it are set forth in the memorandum. Your Honor has quite true considered those arguments in the memorandum Your Honor filed. But I believe that the Greenstein case is substantial authority for the proposition that we attempted to annunciate, and again I do not think this court has jurisdiction to hear [15] this case and to determine it and as a consequence of it we renew our motion to question the jurisdiction of the court.

THE COURT: I appreciate your points, and I think that the points raised by petitioners are sufficiently substantial to have them looked at by the Court of Appeals. So

I will deny the motion as renewed.

MR. WIXON: But to save Your Honor some time and trouble here I might say that it is our proposal to stand on the motion.

THE COURT: And you don't propose to --

MR. WIXON: We are not going to go forward. We are going to stand on the motion.

THE COURT: Mr. Fink.

MR. FINK: Your Honor, in light of that statement, I would like to apprise the court of something that has come to my attention Friday afternoon. There is and was addressed to me a letter by our expert witness which shows that there was a mathematical error made in our computation in Paragraph 4-B. So the amount of tax would actually be -- the claimed excess taxes would actually be reduced. Since this cannot harm the District in any way since our claimed excesses are being reduced and not increased, I would ask the court to move the court to amend the petition in light of this, and we will present testimony to this effect. But for simplicity, the excess taxes we claimed were charged, let me give you the [16] specific lines, Your Honor, in Paragraph 4-B, the second line of 4-B says $5,578.32 that should be $4,378.32.

And on Page 3 the third line down you see the amount $144,000, that should be $884,000. Then the very next three words after that, the difference of what we have there is $185,944, that should read $145,944. And the total claimed excess which now reads $8,798.25 per year should be reduced to read $7,598.25 per year.

THE COURT: So that is $7,598.25?

MR. FINK: Yes, sir.

MR. WIXON: We have no objection, Your Honor.

THE COURT: Thank you. The amendment will be accepted on the stipulation of counsel.

MR. FINK: I have one last request of the court in light of the District's position of standing on their motion, I wondered, and I am asking this for information whether the court would want us to introduce our petition into evidence and make it part of the record. I am trying to say to the court that we are prepared to present a full case, but I wonder how much of the case the court wants to hear in light of this situation because if they are standing on their motion, I would assume that the relief that we have asked would be conceded arguendo subject to --

THE COURT: Well, appeal -- It seems to me highly

appropriate that the fact situation be stipulated in view of the District's position on this. In other words, that it be [17] stipulated that if your witness were to be presented, that he would testify that the values are as set out in the petition and all the rest of it.

In other words, there is no use in going through the formality of a hearing when we already know what the witness will say with these minor corrections. Now, I would suggest that we go off the record for a few minutes and see whether or not based on the District's position of not putting it in their evidence on this subject, they can find themselves able to agree that your evidence would follow and detract petition, don't you know. Off the record

(Off the record discussion.)

THE COURT: On the record.

MR. WIXON: Your Honor, I hate to interject. I am willing to make this kind of concession in the interest of Your Honor's time and all the others' time; namely, that there was employed by the petitioners for the purposes of making an appraisal of the properties here in question Mr. F. E. Dimond; I am willing to agree that Mr. Dimond is qualified as a fee appraiser in the District of Columbia for this purpose. I am

willing to concede that Mr. Dimond would state that he did in fact appraise these properties, that he arrived as a consequence of those appraisals at certain judgments of value, and that he would state the valuations of these several properties to be in the amounts that I do not have right before me [18] now. Now that --

THE COURT: As set out in the petition. As set out in the appraisal.

MR. WIXON: As amended. Yes, as amended. Now, if that is the type of approach that Your Honor and Mr. Fink would agree to as being acceptable, I am perfectly willing to go that far. I cannot concede nor do I propose to concede that the judgments are necessarily correct because we have not agreed to that. We have agreed only at this point to a statement or recitation of the conclusions reached by the expert, and after all that is all an expert does anyway, he gives an opinion.

THE COURT: I understand. But now if you remember I am bound by the factual record so you can be sure that I am going to accept the findings that --

MR. WIXON: Oh, I agree. Under the circumstances I don't think you have any alternative assuming that you accept

the jurisdiction we recognize that quite clearly. We are not now withdrawing from our position. I want that fully understood on the record. I am simply entering this acceptable in order to facilitate this particular proceeding.

MR. FINK: Your Honor, in light of that, I would say that effectively the District has stipulated the evidence which we prepared to present with one exception, and I want to ask them if they are stipulating that also; namely, that with [19] respect to the original or first motion we discussed today we told Your Honor that we would be prepared to show you that in essence minimally that the system that the District uses is a mass appraisal system, and that no new appraisal was in fact made of the property. Nobody went out there and reappraised it in that sense.

THE COURT: Well, I tell you, I can take official notice as I see it of what the situation is with respect to reappraisal and reassessment of a lot which for fiscal 1970 is exactly in the same dollar amount as it was for '69 which is the year in question. I would possibly be aided somewhat in my official notice by facts drawn to my attention rather than facts that I have -- I know, because this court is an administrative court and part of the D. C. Government. You

see, and what happens before a case arrives at this court is procedure followed, are things that I am presumed to know about.

MR. FINK: Your Honor, if that is the case, I would suggest that you might want us to prepare a proposed finding of fact and conclusions of law for Your Honor, which we would exchange between us and recite the factors that Mr. Wixon and I would stipulate on, and then have Your Honor consider whether that is acceptable to you under the circumstances.

THE COURT: That sounds like a good procedure to me. Does it to you, Mr. Wixon?

MR. WIXON: Yes, Your Honor.

[20] MR. FINK: May we have five days in which to exchange them, and may the District have like time to --

THE COURT: Surely. I suggest ten days because this is going to be rather important case, and time isn't of the essence as I see it.

MR. WIXON: Your Honor, so that there can be no misunderstanding here, and probably there isn't. Mr. Fink alluded to the petition which was filed in this case, and I suggested that it might constitute evidence I would want it understood that from our position a pleading is not evidence.

It is simply a recitation of claimed problems, and we have denied of course, allegations in the petition, but I think what we have stated otherwise in this case, is from Mr. Fink's purpose. I just didn't want some involvement here in respect to the petition. What we have admitted, we have conceded in the petition.

THE COURT: Well, now let me button this down, as far as I can see on stipulation of counsel, it has been in effect stipulated that Mr. Fink would present and there are presently in this courtroom certain witnesses who would testify to the basic facts underlying the conclusions of fact which are set out in Mr. Fin's petition together with the exhibits thereto, and now, the District of Columbia neither admits nor denies the facts as set out in that petition and as backed up by the written appraisals that are attached to that petition, [21] but does not desire to present any factual evidence controverting those petitions. Now, those facts as stated in the petitions.

Now, on that basis, for the purposes of the court's ruling on the substance of this case, I take it that only for those purposes and only so that the jurisdictional matter can go forward to the Court of Appeals, only for those purposes

the District admits that plaintiff's evidence that would be as set fort in the appraisal.

MR. WIXON: Appraisal report which is attached, really, yes. And that in so far as I am aware I am -- perhaps Mr. Fink has other witnesses he would present, but at least in so far as expert opinion is concerned, my understanding is that it is Mr. Dimond who would supply his appraisals, conclusions to the court.

MR. FINK: That is correct, Your Honor, and while we are there, I just want to maybe it would be sensible for me to make clear that I assume from all of this that Mr. Wixon understands that we would be able to prove Paragraph 1 of our petition whereby we assert that Towne Towers is a limited partnership and that was denied in their answer, and I would assume that they would concede that we have the evidence here to prove that we are properly before the court in so far as the persons who are affected by the tax are concerned.

MR. WIXON: I will make that concession. At the time we did not have sufficient evidence, information, in our files
[22] to indicate that we should make that concession.

THE COURT: Now, in the conclusions and findings

that you present, Mr. Fink, why the substance of what is going on here and the transcript ought to be incorporated so that the court upstairs will understand the concessions as made.

MR. FINK: If it please the court, it will be in the nature of findings of fact, conclusions of law, and then facts or conclusions of law and then the opinion of the court as if we can agree as we think the court would rule and then present it to Your Honor.

THE COURT: Right.

MR. FINK: I wonder if at this time, since you reserved a ruling on the original motion, motion number one, concerning the effect of the tax on subsequent years whether you would give us some guidance as to your position on that in light of these developments so that we can put something in there to cover the entire proceeding.

MR. WIXON: Would it perhaps be better, Your Honor, if Your Honor had the opportunity to consider that particular motion perhaps reach a conclusion respective and then advise counsel of your conclusions. Perhaps then we could prepare whatever is necessary to finalize this matter. Would that be more expedient or more advisable?

MR. FINK: It is agreeable with me, Your Honor, I want to do whatever is convenient for the court. The only [23] point I was making was I thought that all of the matters ought to be encompassed in the one final order of the court so if we appeal, we can appeal all the matters at the same time.

THE COURT: I don't have enough before me, enough expertise including expertise to rule that a petition filed for 1969 would cover 1970, especially in the face of the statutory provisions. I am aware of the fact that on these mass appraisals that the appraisers for the District of Columbia don't actually revalue each of these parcels every year and theoretically that is what happens theoretically legalistically speaking. And I am up against the legalism, the form of things, rather than the substance. I am up against the fact that the statute says that this is to be done annually. I must say that I don't know where the cut-off would be if I were to rule in future years were included in the petition drafted or given here. I don't know where the cut-off would be.

I would have to set some sort of cut-off such as that the ruling on the year '69 will continue until such time

as there has been an actual re-evaluation. Well, that would be sort of writing the Statute myself as I see it. I mean I am by no means -- anyone who tries to arrogate the power to write these Statutes, and so my inclination certainly is quite clearly to deny the second motion for our hearing. I am [24] also perfectly aware of the multiplicity of papers that are involved, I mean, and the sort of futility of going through the administrative processes here when there is a case pending.

The District assessors all of whom are very honest and very conscientious people have their view, and I am sure that on the Board of Assessment Review on a formal piece of paper to be filed for the 1970, they would reiterate their point of view or even say, "Because of the general increase in values, it is even more conservative than it was in 1969." That is the way things are, but I just can't predicate my decision on this motion on the factual situation that might or might not exist and it probably does exist, but I have to predicate it on the words of the Statute. So I am inclined to deny that motion.

I would suggest that you write your stipulations or findings on the basis of the motion is denied, and I will

give it more consideration. And if I come out to any different result as a result of my deliberations, I will tell you about it at that time.

MR. FINK: Thank you.

MR. WIXON: Your Honor, will probably be interested in the fact that the matter of the proposed fiscal year 1969 evaluation assessment after consideration by the Board of Equalization Review was reduced from that originally proposed.

THE COURT: Well, that is brought out in the petition.

[25] MR. WIXON: Yes, sir, I was only suggesting that however unfortunate it may be depending upon the conclusions reached, let us say unfortunate for Mr. Fink's client or for the District, it is rather difficult to say that an appeal to that Board would not perhaps produce a gain or different results. You can't really say that we start off with the figures too which is the proposed assessment of which the taxpayer is made aware, and it is because of the possibility of error that the Board of Equalization and Review has been proposed to hear these matters. So to say that the proposed assessment, if you will, for 1970, 1971, and 1972 would not have been adjusted had their been an appeal to the Board of Equalization and Review is to make assumptions I think which are extraordinary difficult to manage.

THE COURT: Right. That is the reason that I am inclined to go the way I am on this. Unlike, for instance, the official notice that I took in the first on my memorandum of the first motion, where I took official notice of the fact that real estate bills come out providing for payment in September and March and so on, this here depends on the Board of Equalization and. The Board might have completely different members with completely different philosophies from year to year. Some Board member might come on and feel that he is not at all constrained to abide by the decisions of the last year's Board of Equalization and Review. They ought to have a

[26] chance to exhaust the administrative process in each case as I see it before you get this far.

It may be pro forma, but there is a chance that it won't be pro forma. Is there anything else to come before us?

MR. FINK: Just one observation if I may continue that thought, Your Honor. There was reference made to the Shoreham Hotel case. I think Mr. McCally mentioned that the file with subsequent petitions, but the question is whether the subsequent petitions --were those subsequent petitions all heard in the same case. I assume that they were. They were not?

MR. WIXON: They were not.

MR. FINK: They were heard as a separate appeal?

MR. MC CALLY: They were because the cases were going on and the other petition had not come up yet.

THE COURT: So that the decision in the Shoreham Hotel case covered a given fiscal year.

MR. MC CALLY: Well, it never went to a decision, Your Honor. The case was settled, but it went -- the case was heard and only for those years encompassed in the first petition where it had to be another hearing because it was a different year and different appraisements or assessments had been made.

THE COURT: Is there anything further?

MR. FINK: No, Your Honor, thank you.

[27] MR. WIXON: Thank you, sir.

THE COURT: The hearing is hereby concluded.

(Whereupon, at 10:55 a.m., the hearing in the above-entitled matter was concluded.)

* * * *

FILED
OCTOBER 22, 1969

DOCKET NO. 2072

REPLY TO MEMORANDUM IN OPPOSITION TO PETITIONERS' MOTION FOR LEAVE TO AMEND PETITION

1. Respondent's contention concerning Rule 11 of the Rules of this Court is not well founded. The Petition itself, Paragraphs 4(a) and (b) refer to a claim for excess taxes charged--per year. The Petition to amend was an attempt to bring to the attention of the Court the contentions of the District concerning the limitation of the applicability of a ruling to be made by this Court in this case upon a final hearing. The Petitioners' contentions are that they are entitled to this relief as a matter of law. Therefore, their request for general relief is appropriate under these unusual circumstances.

2. With respect to Section 47-702 of the District of Columbia Code, 1967, referring to annual assessments of real estate, Petitioners take the position that in the absence of affirmative action by the taxing authorities concerning the valuation of the property in an either upward or downward direction, the District has, in fact, made no reassessment of the property for the subsequent year. Absent such affirmative

action, putting the Petitioners on notice of a proposed change or affirmation as the case may be, the District is bound by the litigation pending as that litigation may affect all subsequent tax years.

* * * *

FILED
JANUARY 13, 1970

DOCKET NO. 2072

D E C I S I O N

On December 30, 1968, petitioners filed their petition for review of two real estate tax assessments determined by the Board of Equalization and Review on May 6, 1968, for the fiscal year 1969 (i.e., July 1, 1968 to June 30, 1969).

On September 30, 1968, petitioners had timely paid the first half of the taxes resulting from such assessments, totalling $34,707.92, in accordance with the respondent's long and firmly established rule that the "first half" of such taxes is due by September 30 and the "second half" by March 31 of the given fiscal year.

On February 13, 1969, respondent filed its motion to dismiss the petition for review on the basis that the total taxes due as a consequence of the assessments had not been paid in full prior to the filing of the petition, and

contending that this court therefore lacks jurisdiction to hear and determine the proceeding. On February 24, 1969, petitioners filed their opposition to this motion to dismiss.

On June 19, 1969, the court issued its Ruling and Order on Motion to Dismiss Petition, denying the dismissal of the petition and ruling that the appeal would be heard and determined on the merits upon showing that the second half of the taxes resulting from the said assessments had been paid. 97 W.L.R. 1197; CCH D.C. State Tax Reporter, par. 200-136.

On August 1, 1969, petitioners and respondent filed their stipulation "that the March installment of tax has been paid in full on the 26th day of March, 1969"; i.e., had been timely paid in full. The attachments to the stipulation show payments totalling $34,657.92 on account of this, the "second half" of the taxes due for the fiscal year 1969.

On October 10, 1969, petitioners filed their motion for leave to amend their petition to incorporate therein the review on the merits of the assessments made by the Board of Equalization and Review for the fiscal year 1970 (i.e., July 1, 1969 to June 30, 1970) and "all subsequent years

thereafter" for the properties in question. It appears from said motion that such assessments for 1970 were identical with the assessments for 1969, and that relief is sought in order to avoid multiplicity of actions.

On October 14, 1969, respondent filed its opposition to this motion for leave to amend. It appears from said opposition that respondent contends that assessments are, as a matter of law, annual rather than occasional or sporadic, no matter what the actual facts may be, and that complaint to the Board of Equalization and Review must accordingly be reiterated each year.

On October 14, 1969, respondent also filed its answer to the petition herein, generally denying most of the allegations made therein, and putting petitioners to their proof.

On October 15, 1969, the court issued its order deferring until after the hearing on the merits its ruling on petitioners' motion of October 10, 1969 for leave to amend.

On October 20, 1969, the proceeding came on for hearing on the merits, resulting in the stipulations, findings and conclusions detailed below.

On October 22, 1969, petitioners filed their reply to respondent's opposition to motion for leave to amend. It

appears from said reply that petitioners contend that absent "affirmative action", there has in fact been no annual re-assessment of the properties in question for the fiscal year 1970 or other years subsequent to the assessments for 1969 now in question, and that the determination for 1969 will as a matter of fact bind subsequent years in the absence of actual reassessments.

The motion for leave to amend. The motion is denied on the authority of Congregational Home v. District of Columbia, 92 App. D.C. 73, 202 F.2d 808. The Court there accepted at face value the statutory procedure for annual assessments, assumed that the various steps in the listing of property subject to taxation had been taken, including consideration of taxpayer's claim to exemption from taxation, and denied taxpayer's right to make claims for exemption in

Equally, in the case at bar, the assessment of petitioners' real estate is, as a matter of law, "made annually", Code 47-702, on the basis of "the value of each separate tract or lot of real property in the District of Columbia in lawful money", Code 47-705, subject to revision by the Board of Equalization and Review, Code 47-708. Since petitioners have not reiterated their complaint concerning

the assessments on the properties in question for the fiscal year 1970 to the Board of Equalization and Review, they may not be heard thereon in this court. Code 47-709.

The hearing on the merits. (a) On stipulation of counsel, a mathematical error in the computations set out in paragraph 4(b) of the petition, resulting in the reduction of petitioners' claim for refund from $8,798.25 to $7,598.25, was accepted.

(b) On stipulation of counsel, petitioners are accepted as the real parties in interest, with personal capacity to maintain this proceeding.

(c) On stipulation of counsel, it is accepted that Mr. F. E. Diamond, a qualified fee appraiser in the District of Columbia, personally present at the hearing, would testify that in his expert opinion the appraised value of the Towne Towers Apartments for purposes of D. C. real estate tax for fiscal 1969 is $1,173,250 and of the Aristocrat Apartments is $884,000, rather than, respectively, $1,280,581 and $1,029,944 at which figures said properties were assessed. It is equally accepted that the real estate taxes resulting from the assessments thus determined to be excessive are, in turn, excessive in the amount of $3,219.93 for the Towne Towers property and $4,378.32 for the Aristocrat Apartments property, or a total of $7,598.25.

(d) Respondent presents no evidence controverting the facts so accepted by stipulation, but stands on and reaffirms its position that the D. C. Tax Court lacks jurisdiction to hear the proceeding on the merits.

Wherefore, it is ordered and adjudged, that

1. Petitioners' motion for leave to amend be, and hereby is, denied.

2. Respondent's motion to dismiss, re-presented at the hearing herein, be and hereby is denied. The Ruling and Order on Motion to Dismiss issued June 19, 1969 is hereby incorporated herein by reference.

3. Petitioners shall have and recover from the District of Columbia the sum of $7,598.25 plus statutory interest, on account of excess taxes paid on the properties more fully described in the petition herein, for the fiscal year 1969.

* * * *

FILED
JANUARY 26, 1970

DOCKET NO. 2072

PETITION FOR REVIEW OF A DECISION OF THE DISTRICT OF COLUMBIA TAX COURT

To the Honorable Chief Judge and Circuit Judges of the United States Court of Appeals for the District of Columbia Circuit:

1. The District of Columbia petitions for review by the United States Court of Appeals for the District of Columbia Circuit, of a decision of the District of Columbia Tax Court made in the above-entitled case.

2. The decision of which review is sought reversed an assessment of real estate tax against petitioners Allen Berenter, Allen Morris, Max Leder, and David Hornstein, general partners of Towne Towers Associates, a limited partnership, for the fiscal year 1969, in the total amount of $7,598.25.

3. The decision of the Tax Court was entered on January 13, 1970.

* * * *

FILED
JANUARY 29, 1970

DOCKET NO. 2072

CROSS-PETITION OF PETITIONERS FOR REVIEW OF A DECISION OF THE DISTRICT OF COLUMBIA TAX COURT

To the Honorable Chief Judge and Circuit Judges of the United States Court of Appeals for the District of Columbia Circuit:

1. Allen Berenter, Allen Morris, Max Leder, David Hornstein, as General Partners of Towne Towers Associates,

a Limited Partnership, Cross-Petitioners herein, Petition for Review by the United States Court of Appeals for the District of Columbia Circuit, of a decision of the District of Columbia Tax Court made in the above entitled case. (D.C. Code, §47-24(a) (1967 ed.))

2. The Cross-Appeal seeks review of that portion of the decision which denied Petitioners' Motion for Leave to Amend the Petition, filed October 10, 1969. By denying the Motion the Tax Court refused to find that the adjustment to the assessment binds all subsequent years in the absence of actual reassessments having been made during the pendency of this litigation.

3. The decision of the Tax Court, including the denial of the Motion for Leave to Amend was entered on January 13, 1970.

* * * *

BRIEF FOR ~~APPELLEES~~ RESPONDENTS AND CROSS-APPELLANTS PETITIONERS'

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,997

DISTRICT OF COLUMBIA,

~~Appellant~~ PETITIONER,

v.

ALLEN BERENTER, ET AL.,

~~Appellees~~ RESPONDENTS.

No. 24,003

ALLEN BERENTER, ET AL.,

Cross ~~Appellants~~ PETITIONERS,

v.

DISTRICT OF COLUMBIA,

Cross ~~Appellee~~ RESPONDENT.

On Petition For Review Of A Decision
Of The District Of Columbia Tax Court

JULES FINK
of Euzent, Katz & Fink
Attorney for ~~Appellees~~ RESPONDENTS and
Cross ~~Appellants~~ PETITIONERS
8720 Georgia Avenue
Silver Spring, Maryland, 20910
587-6064

TABLE OF CONTENTS

TABLE OF CASES

* Cases chiefly relied upon are marked by an asterisk.

STATUTES CITED

OTHER AUTHORITIES CITED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,997

DISTRICT OF COLUMBIA,

Appellant,

v.

ALLEN BERENTER, ET AL.,

Appellees.

No. 24,003

ALLEN BERENTER, ET AL.,

Cross Appellants,

v.

DISTRICT OF COLUMBIA,

Cross Appellee.

On Petition For Review OF A Decision
Of The District Of Columbia Tax Court

BRIEF FOR APPELLEES AND CROSS-APPELLANTS

This Case has previously been before this Court on cross motions for summary reversal and summary affirmance, which motions were denied on July 31, 1970.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The Tax Court's decision in favor of the Taxpayers in Appeal Docket No. 23,997 was correct. The Court did not lack jurisdiction since the payment of the real property taxes in installments is payment of the tax within the meaning of Code Section 47-2403 "provided such person shall first pay such tax". Timely payment of one-half of the tax would authorize the Court to deem the appeal lodged, requiring a hearing only after showing that the second installment (the remaining one-half of the real estate taxes) had also been paid.

2. The decision of the Tax Court in Appeal Docket No. 24,003 was incorrect in denying the Taxpayers' Motion to amend the petition so that the decision in that case would govern the taxable year 1970 and subsequent years where a proffer was made showing that no re-appraisal of the property was in fact made, and the assessment for fiscal 1970 had remained the same as that for fiscal 1969 after its adjustment by the Board of Equalization and Review.

REFERENCES TO RULINGS

1. "Ruling and Order on Motion to Dismiss Petition", D. C. Tax Court Docket No. 2072, June 19, 1969, App. 36-61.

2. "Decision", D. C. Tax Court Docket No. 2072, January 13, 1970, App. 110-115.

---

3. SUPPLEMENTAL RULINGS DEEMED RELEVANT

DISTRICT OF COLUMBIA TAX COURT

CAPITOL PARK PROPERTIES ASSOCIATES, et al., Petitioners, v. DISTRICT OF COLUMBIA, Respondent.	]	FILED FEBRUARY 26, 1970 DOCKET NOS. 2099, 2100 2101, 2102 and 2103

ORDER DENYING MOTIONS TO DISMISS

(App. 71-74).

ORDER DENYING TAXPAYER's MOTION TO AMEND PETITION.

(App. 113)

STATEMENT OF THE CASE

On December 30, 1968, Allen Berenter, Allen Morris, Max Leder, David Hornstein, the General Partners of Towne Towers Associates, a limited partnership, hereinafter referred to as "taxpayers", filed a petition in the District of Columbia Tax Court to "***protest a Real Estate Tax Assessment for the fiscal year 1969 made pursuant to Section 47-708, District of Columbia Code.***" The petition identifies the properties as Lots 29 and 934 in Square 212. The taxes in controversy are real property taxes on the described lots for the fiscal year 1969.

The Petition attacked the assessment proposed for the fiscal year 1969 as well as the assessment as equalized by the Board of Equalization and Review for fiscal year 1969. The exhibits attached to the Petition (App. 12-31) contain a tax analysis which sets forth the assessment which Petitioners contend was the correct and proper assessment, to-wit, $884,000 on the Aristocrat Apartments located at 1440 N Street, N. W., Washington, D. C., Square 212, Lots 29, 30, 31, 32, 33, 106, 107, 108, and $1,173,250 on the Towne Towers Apartments, 1420 N Street, N.W., Washington, D. C., Square 212, Lot 834. On the

record, the District of Columbia did not present any factual evidence to controvert the facts as set out in the Petition and the written appraisals attached thereto and ultimately elected to stand on its "Motion to Dismiss" which had been denied.

The District's motion to dismiss the petition was grounded on the allegation that the Tax Court lacked jurisdiction for the reason that the taxpayers had failed to pay all the real property taxes complained of prior to the filing by them on December 30, 1968, of their petition (App. 32). The record in this case indicates that the taxpayers TIMELY paid both the first half of the real property taxes on September 30, 1968, and the second half of the real property taxes on March 26, 1969 (App. 62-68).

On June 19, 1969, the Tax Court denied the District's motion to dismiss (App. 61). The District then filed its answer to the petition and the taxpayers, on October 10, 1969, filed a "Motion for Leave to Amend Petition." The Tax Court deferred its ruling on the motion and the case was heard on the merits on October 20, 1969 (App. 74, 69).

As the Tax Court stated in its decision, counsel for

the taxpayers and counsel for the District stipulated that

> "*** Mr. F. E. Diamond, a qualified fee appraiser in the District of Columbia, personally present at the hearing, would testify that in his expert opinion the appraised value of the Towne Towers Apartments for purposes of D. C. real estate tax for fiscal year 1969 is $1,173,250 and of the Aristocrat Apartments is $884,000, rather than, respectively $1,280,581 and $1,029,944 at which figure said properties were assessed.***" (App. 114) (inadvertently referred to in Brief for the District as App. 62).

Upon this Court's affirming the Tax Court's decision in 23,997, taxpayers would be entitled to recover from the District the sum of $7,598.25 plus statutory interest, due to excess taxes paid on the properties as described in the Petition.

The District presented no evidence and elected to stand on its "Motion to Dismiss".

On January 13, 1970, the Tax Court handed down its decision in which it said:

> "1. Petitioners' motion for leave to amend be, and hereby is, denied."
>
> "2. Respondent's motion to dismiss, re-presented at the hearing herein, be and hereby is denied. The Ruling and Order on Motion to Dismiss issued June 19, 1969 is hereby incorporated herein by reference."

> "3. Petitioners shall have and recover from the District of Columbia the sum of $7,598.25 plus statutory interest, on account of excess taxes paid on the properties more fully described in the petition herein, for the fiscal year 1969." (App. 115).

The District and the taxpayers then filed Cross-Petitions For Review Of a Decision Of The District Of Columbia Tax Court. (App. 115-117).

On March 26, 1970, this Court granted the motion of the taxpayers to consolidate the cross appeal and appeal, each of which had been filed on March 11, 1970.

On March 30, 1970 the District and the taxpayers filed a joint motion to extend the time within which to file the brief and joint appendix and requested the Court to grant additional time for both parties to file their petitions for summary relief. This motion was granted on April 27, 1970.

Thereafter the District filed on April 24, 1970, a combined motion for summary reversal in docket numer 23,997 and for summary affirmance in docket number 24,003. The taxpayers thereafter, on May 4, 1970, filed their combined motion for summary affirmance in docket number 23,997 and for summary reversal in docket number 24,003. On July 31, 1970 this Court denied all motions.

ARGUMENT

I

The Tax Court properly lodged Taxpayers' Appeal after September installment (one-half) of real estate taxes were paid and heard and determined their Appeal after a showing that the March installment (the remaining one-half) of the real estate tax had also been paid.

The statutory language of Section 47-2403 of the D. C. Code "shall first pay such tax" does not require prepayment of the tax. The language of that statute is as follows:

> "Any person aggrieved by any assessment by the District against him of any personal-property, inheritance, estate, business-privilege, gross-receipts, gross-earnings, insurance-premiums, or motor-vehicle fuel tax or taxes, or penalties thereon, may, within ninety days after notice of such assessment, appeal from such assessment to the board, provided such person shall first pay such tax, together with penalties and interest due thereon, to the collector of taxes of the District of Columbia. The mailing to the taxpayer of a statement of taxes due shall be considered notice of assessment with respect of such taxes. The board shall hear and determine all questions arising on said appeal and shall make separate findings of fact and conclusions of law, and shall render its decision thereon in writing. The board may affirm, cancel, reduce, or increase such assessment." (Underscoring supplied.)

This section of the Code requires that the person aggrieved

> "* * * shall first pay such tax, together with penalties and interest due thereon, to the collector of taxes of the District of Columbia. * * *"

The foregoing section of the D. C. Code is properly construed by giving effect to Section 47-1209 stating "real estate taxes shall hereafter be payable semiannually in equal installments in the months of September and March." Thus, the language "shall first pay such tax" of Section 47-2403 must mean to first pay whatever tax is due at the time the petition is filed.

The undoubted Power of Congress to provide any reasonable system for the collection of taxes and the recovery of them where illegal requires that property not be taken without due process of law insofar as the method of collecting and protection of the taxpayer is concerned. In this case, taxpayers' constitutional rights would be violated to construe the statute as denying their right to appeal (App. 61)

Greenstein v. District of Columbia, D.C.T.C. Order dated 5/10/62 (affirmed without opinion by the U.S.C.A. for the District of Columbia Circuit on February 13, 1963) (App. 48, 49) should not be dispositive of this case because the rationale on which it apparently rests is not supported by the statute in question.

Section 47-2403 of the D. C. Code, incorporated by reference in Section 47-2405, refers to taxes which are personal debts of those liable therefor, whereas the real estate tax lies against the property itself, and not the person. There-

fore, apprehension concerning ultimate non-payment of taxes before a Petition is filed is not relevant in considering the policy and intent of the D. C. real estate tax laws.

A requirement that real estate taxes be prepaid as a condition to the Tax Court's review would preclude taxpayers use of dollars representing one-half of the taxes due for a period of six months.

The language of the statute authorizing an appeal in real property tax matters in Section 47-709, D. C. Code, 1967, is as follows:

> "* * *Any person aggrieved by any assessment, equalization, or valuation made, may within ninety days after October 1 of the year in which such assessment, equalization, or valuation is made, appeal from such assessment, equalization or valuation in the same manner and to the same extent as provided in Sections 47-2403 and 47-2404: Provided, however, that such person shall have first made his complaint to the Board of Equalization and Review respecting such assessment as herein provided, except that, in case of increase of valuation of real property over that for the immediately preceding year, where no notice in writing of such increase of valuation is given the taxpayer prior to March 1 of the particular year, no such complaint shall be required for appeal."

The authority of the Tax Court is to "***affirm, cancel, reduce, or increase such assessment," and, according to Section 47-2407 of the Code,

> "Any sum finally determined by the Board to have been erroneously paid by or collected from the taxpayers

> shall be refunded by the District to the taxpayer from its annual appropriation for refunding erroneously paid taxes in said District." [underscoring supplied]

Real estate taxes and personal property taxes may be paid semiannually in equal installments in the months of September and March (Section 47-1209, D. C. Code, 1967):

> "Real estate taxes and personal taxes of all kinds shall hereafter be payable semiannually in equal installments in the months of September and March..." (Underscoring supplied)

Section 47,2403, D. C. Code, 1967, has been described by the Court below "as a secret flaw in the Code" since a cross-reference is misnumbered in the Code when the Code is compared to the basic statute. Code Section 47-2405 codifies subsection (q) of Section 5 of Title 9 of the Revenue Act of 1937, as amended by the Act of June 10, 1952, which provides for Appeal from such assessment, equalization, or valuation in the same manner and to the same extent as provided in Sections 3 and 4 of this Title.

Sections 3 and 4 are Sections 47-2403 and 47-2404 of the Code--not Sections 47-204 and 47-2413 as referred to in the Code Section 47-2405.

The Legislative history, which added Title 9 to the District of Columbia Revenue Act of 1937, makes no reference to tax prepayment with regard to Tax Appeals. It is futile to speculate

as to the failure of the Congressional Committee Reports to make reference to "prepayment" or "full payment" of a disputed tax as a pre-requisite to an appeal. (H.R. 10066, 75th Congress, 3rd Session, which became the Act of May 16, 1938, and added Title 9 to the District of Columbia Revenue Act of 1937 establishing the then Board of Tax Appeals; Senate Report No. 1612 accompanying H.R. 10066, 75th Congress, 3rd Session, dated April 18, 1938, and in House Report No. 2107, 75th Congress, 3rd Session, accompanying H.R. 10066, dated April 7, 1938.)

It is, therefore, desirable to accept the words of Section 47-2403 "first pay such tax" as requiring only that payment be made as due and not in advance. This position is strengthened by construing Section 47-2403 giving effect to Section 47-1209 which provides that "real estate taxes shall hereafter be payable semi-annually in equal installments in the months of September and March." (Underscoring supplied) The installment payment provision uses the word "shall". Cases are legion which construe the word "shall" as mandatory. It is, therefore, questionable as to whether installment plan payments are the election of the taxpayer as asserted by the District, or a requirement. It would seem that the total tax assessed need, therefore, not be paid before the Appeal of erroneous assessments can be filed.

The Court below took judicial notice of the fact that in modern times, real estate tax bills issued by the District of Columbia had been payable in two equal installments--September and March (App. 38, 107). The Court also pointed to the D. C. forms FP-176A (Rev. 3-68) and FP-177 (Rev. 8-68) which state:

> First Half Due by September 30, 1968
>
> This bill is for real estate taxes due for the period July 1, 1968 to June 30, 1969.
>
> Total tax may be paid with this bill. If total tax is not paid, you will receive a bill for second half tax due March 31, 1969. (Underscoring supplied.)
>
> 1969 Second Half Tax Due by March 31, 1969
>
> After September 30, 1968, 1st half tax is increased by 1% per month until paid (App. 37-38).
>
> After March 31, 1969, 2nd half tax will be increased by 1% per month until paid (App. 37-38).

These facts of which the Court below took judicial notice further support taxpayers' contention with respect to the necessity of reading the two aforementioned sections of the Code together in arriving at a proper result.

The District would have the Court strictly construe the statute and deny taxpayers their day in court because of the application of Code Section 47-2413(c) which provides:

> The remedies provided to the taxpayer under this chapter shall not be deemed to take away from the taxpayer any remedy which he might have under any other provision of law, but no suit for the recovery of an overpayment of any tax shall be instituted in any court if the taxpayer has elected to file an appeal with respect to such overpayment with the Board of Tax Appeals for the District of Columbia under this Chapter.

Giving effect to the language of this statute, taxpayers may not upon dismissal of their Tax Court proceeding institute their suit in any other Court. They are thus deprived and left without recourse to any jurisdictional or administrative reviewing body for determination of their claims against the action of assessing authorities which deprive them of tax dollars.

This Court was faced with a similar conundrum concerning the unincorporated business franchise tax in D. C. v. Brady, 109 U.S. App. D.C. 324, 288 F. 2d 108, which would tend to support the elimination of taxpayers' right to review if their right to proceed in the D. C. Tax Court is denied.

The taxpayers would be deprived of substantial constitutional rights concerning taking of their property without due process of law by the failure to afford them the right to appear before an appellant tribunal at some stage before the tax is irrevocably fixed. Willmut Gas & Oil Co. v. Fly, 322

F. 2d 301, 303 (CAS). It is desirable to avoid the constitutional questions inherent in this situation where it is possible to so construe the statute. (See Wickwire v. Reinecke, 275 U.S. 101, 105-106 and Old Colony Trust Co. v. Com'r., 279 U.S. 716, 727-728).

The District cited Greenstein v. District of Columbia (supra, page 8). The Court below deemed the matter not conclusively settled, citing A.L.I. Restatement of the Law of Judgments, 1942, P. 319:

> Under the doctrine of stare decisis, when a court has in one case decided a question of law it will, in subsequent cases in which the same question of law arises, ordinarily decide it in the same way. The doctrine is not rigidly applied, and a court will sometimes overrule its prior decision. ***

Industrial Bank of Washington v. D. C., 88 U.S. App. D. C. 233, 188 F. 2d 46, which involved an appeal from the Tax Court to this Court, affirmed the then Board of Tax Appeals holding the requirement "first pay such tax" was clearly jurisdictional and citing the McFall case, 88 U.S. App. D. C. 217, 188 F. 2d 991, which involved an excise tax on the issuance of original certificates of title to motor vehicles under the statute which authorized an appeal "provided such person shall first pay such tax ... under protest in writing".

It is obvious that the Industrial Bank of Washington v. D. C., supra, case does not explain the jurisdictional necessity for the requirement of payment of a tax not yet due. Neither does the McFall case, supra, explain why the requirement for protest in writing clause considered there is modified by the word "first" when that word in the statute is directly related only to the requirement that the taxpayer shall "pay such tax".

A tangential matter requires a brief comment. The District of Columbia has always argued and has been clearly apprehensive of the idea that a taxpayer may have a right to appeal before his taxes were paid and then end up failing to pay those taxes. While this concern is relevant when considering the policy, intent and statutory language providing for the collection of taxes, it is sufficient to note that Code Section 2403 incorporating Section 2405 refers only to taxes which are personal debts of those liable individuals. This is unlike the real estate tax which is a debt which lies against the property itself and not against the person.

In its opposition to the Motion to Dismiss filed below (App. 36) taxpayers pleaded in the alternative that should the Court feel compelled to uphold the District's contention, they are entitled to be heard on their claim for tax relief

based on their payment of one-half of the taxes assessed. This question was reserved by this Court in its decision in the Industrial Bank of Washington v. D. C., case, supra.

II.

The Tax Court improperly rejected Taxpayers' Motion to Amend its Petition so as to Include all Subsequent Tax Years which Included the Fiscal Year 1970

The Court below denied Taxpayers' Motion to Amend the Petition previously filed in the Tax Court on December 30, 1968, so as to have the original Petition applied to all fiscal tax years subsequent to fiscal year 1969. The District objected on the grounds that Rule 11(a) of the Rules of Procedure of the Court below required a pleading to state reasons granting it and providing that it shall be accompanied by the proposed amendment. This argument was overruled by the Court below citing substance over form.

The Taxpayers proffered to the Court and the Court accepted the fact that the mass appraisal system is in effect in the District and that the appraisers do not and cannot actually revalue the parcels every year (App. 104). Thus, in subsequent years the assessment remains the same as that for fiscal year 1969. In order to avoid filing multiplicity of actions with the Board of Equalization and Review and in the Tax Court, it was submitted that an amendment to cover subsequent

years was proper.

Section 47-702 of the D. C Code of 1967 does provide that assessments shall be made annually. Recognizing this, Taxpayers, nevertheless, contend and it was not denied in the Court below that the assessment for fiscal 1970 had in fact remained the same as that for fiscal 1969 after its adjustment by the Board of Equalization and Review, and that no reappraisal was in fact made of the property. It would therefore seem that Taxpayers are entitled to have the ruling by the Tax Court apply to subsequent years, at least under the circumstances set forth herein.

CONCLUSION

Based upon the foregoing, it is respectfully submitted:

1. That in No. 23,997 this Court should affirm the decision of the Tax Court.

2. That the decision of the District of Columbia Tax Court, as it relates to the Taxpayers' Motion for Leave to Amend in No. 24,003, should be reversed.

3. That No. 24,003 should be remanded with instructions to grant the relief requested for fiscal year 1970, and all subsequent years in which the assessments have remained the same and no reappraisal was in fact made of the property.

JULES FINK
of Euzent, Katz & Fink
8720 Georgia Avenue
Silver Spring, Maryland 20910
587-6064

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DISTRICT OF COLUMBIA,	]	
Appellant.	]	No. 23,997
v.	]	
ALLEN BERENTER, ET AL.,	]	
Appellees.	]	
Consolidated with	]	
ALLEN BERENTER, ET AL.,	]	
Cross Appellants	]	
v.	]	No. 24,003
DISTRICT OF COLUMBIA,	]	
Cross Appellee.	]	

CERTIFICATE OF SERVICE

I hereby certify that copies of the Reply Brief for Appellees and Cross Appellants and Appendix were mailed, postage prepaid, to Robert E. McCally, Esq., Assistant Corporation Counsel, D. C., Attorney for the District of Columbia, District Building, Washington, D. C., 20004, this ____ day of November, 1970.

JULES FINK
of Euzent, Katz & Fink
Attorney for Appellees and
Cross Appellants
8720 Georgia Avenue
Silver Spring, Maryland, 20910